TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 101.

THE BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JULY 12, 1910.

(22,256)

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a United States Circuit Court of Appeals for the Ninth Circuit.

No. 1799.

THE BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY (a Corporation), Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Printed Transcript of Record.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Northern Division.

Filed Jan. 7, 1910. Frank D. Monckton, Clerk.

1 [*Names and Addresses of Attorneys.*]

C. H. Lingenfelter, U. S. Attorney for the District of Idaho, Attorney for the Defendant in Error.
Myron A. Folsom, Esq., Spokane, Wash
J. H. Forney, Esq., Moscow, Idaho, Attorneys for Plaintiff in Error.

In the Circuit Court of the United States, Ninth Judicial Circuit, for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY (a Corporation), Defendant.

Complaint.

The United States of America, by C. H. Lingenfelter, its attorney for the District of Idaho, acting in this behalf by direction of the Attorney General of the United States, brings this its complaint against the Bunker Hill & Sullivan Mining & Concentrating Company, a corporation, and for cause of action alleges:

I.

That at all the times herein mentioned the Bunker Hill &
2 Sullivan Mining & Concentrating Company was and now is a corporation organized under the laws of the State of Oregon and doing business within the State and District of Idaho, with its principal place of business, in said State and District of Idaho, at Kellogg, County of Shoshone, State and District of Idaho.

II.

That on or about the 18th day of November, 1903, one W. M. Messinger, made Homestead Entry No. 1483 at the United States Land Office in the Coeur d'Alene, Idaho, land district for the S. ½ NW. ¼ and Lots 3 and 4, Section 4, in Township 48 North, Range 2 East, Boise Meridian, said land then and there being non-mineral, unreserved public lands of the United States and not within the limits of any railroad grant.

III.

That on or about the — day of February, 1906, the said W. M. Messinger relinquished his said homestead entry to the United States and wholly failed to perfect a title thereto under the homestead laws of the United States, or at all.

IV.

That heretofore, to wit, between the 1st day of April, 1904, and the 31st day of December, 1905, the said W. M. Messinger, then and there unlawfully and willfully felled, cut down and removed timber and trees, then and there standing and growing, and then and there being upon the said lands aforesaid, and the said timber and trees then and there being the property of the said plaintiff, The
3 United States of America, and unlawfully and willfully manufactured therefrom 8652 linear feet of 6-inch stulls of the value of 2¼ cents per linear foot and 394 linear feet of 8-inch stulls of the value of 4 cents per linear foot, and 7220 linear feet of 10-inch stulls of the value of 6 cents per linear foot, and 2412 linear feet of 12-inch stulls of the value of 7 cents per linear foot, and 881 linear feet of 14-inch stulls of the value of 8 cents per linear foot, and 323 linear feet of 16-inch stulls of the value of 9 cents per linear foot, and 740 cords of wood of the value of $4 per cord, and of the total value of $3,872.02, then and there the property of the plaintiff; which said stulls and cordwood the said W. M. Messinger aforesaid did then and there unlawfully and wrongfully convert to his own use and benefit and unlawfully and wrongfully took and carried away the said timbers, trees, stulls and cordwood so felled and cut from the place where felled and cut aforesaid to or near the town of Kellogg in the County of Shoshone, State of Idaho, and thereafter unlawfully and wrongfully sold and delivered the said timber, trees, stulls and cordwood so cut, felled and removed as aforesaid, to the defendant, the Bunker Hill & Sullivan Mining & Concentrating Company, a corporation, and the said Bunker Hill & Sullivan Mining & Concentrating Company, then and there received into its possession the said timber, trees, stulls and cordwood, so unlawfully and willfully cut by the said W. M. Messinger aforesaid of the total value of $3,872.02, being then and there the property of the plaintiff, and then and there received the same
4 from the said W. M. Messinger, and then and there unlawfully and wrongfully appropriated and converted the same to its own use and benefit to the damage of the plaintiff in the sum of

Three Thousand Eight Hundred and Seventy-two Dollars and Two Cents.

Wherefore, plaintiff demands judgment against the defendant, the Bunker Hill & Sullivan Mining & Concentrating Company, a corporation, for the sum of $3,872.02, together with costs of suit, and such other and further relief as to the Court may seem meet and proper.

C. H. LINGENFELTER,
United States District Attorney for the District of Idaho, and Attorney for Plaintiff.

STATE OF IDAHO,
County of Ada, ss:

C. H. Lingenfelter, being first duly sworn on his oath, deposes and says: That he is the United States District Attorney for the District of Idaho and attorney for the plaintiff and that he makes this affidavit for and on behalf of the United States of America; that he has read the foregoing complaint and knows the contents thereof and that the same is true as he verily believes.

C. H. LINGENFELTER.

Subscribed and sworn to before me this 14th day of January, A. D. 1909.

A. L. RICHARDSON,
Clerk United States Circuit Court.

5 [Endorsed:] Filed Jan. 14, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 395.

THE UNITED STATES OF AMERICA
vs.
BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY (a Corporation).

Summons.

The President of the United States to Bunker Hill & Sullivan Mining & Concentrating Company, a Corporation, the above named defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Moscow in said District, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this Summons upon you, if served within the Northern Division of said district, or if served within any other Division of said District, then within forty days from the

date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will apply to the Court for the relief demanded in the complaint, to wit: for a judgment in the sum of $3,872.02, together with costs of suit.

6 The facts more fully appearing in plaintiff's complaint, a certified copy of which is hereto attached and made a part hereof.

And this is to command you the marshal of said district, or your deputy, to make due service and return of this Summons. Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, affixed at Boise, in said District this 14th day January, 1909.

[SEAL.] A. L. RICHARDSON, *Clerk.*

I hereby certify that I received the within summons at Moscow, Latah County, Idaho, on Jan. 16th, 1909, and served the same upon the Bunker Hill & Sullivan Mining & Concentrating Co., a corporation, by personally handing to and leaving with Stanley A. Easton, Statutory Agent of said Bunker Hill & Sullivan Mining & Concentrating Co., a corporation, at Kellogg, Shoshone Co., Idaho, on Jan. 21, 1909, a duplicate copy of said Summons attached to a copy of Complaint referred to in said Summons.

S. L. HODGIN,
U. S. Marshal,
By J. E. GREEN,
Deputy.

Moscow, Idaho, Jan. 23rd, 1909.

[Endorsed:] No. 395. In the Circuit Court of the United States for the District of Idaho, Northern Division. United States
7 of America vs. Bunker Hill & Sullivan Mining & Concentrating Company a Corporation. Summons. Returned and filed Jan. 26, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY (a Corporation), Defendant.

Demurrer.

Comes now the defendant in the above-entitled action and demurs to the complaint filed herein and for cause of demurrer alleges:

I.

That the complaint herein does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore, defendant asks judgment on demurrer.

M. A. FOLSOM,
J. H. FORNEY,
Attorneys for Defendant.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

J. H. FORNEY,
Of Counsel for Defendant.

8 Service by copy of the foregoing demurrer is admitted at Boise, this 5th day of February, A. D. 1909.

C. H. LINGENFELTER,
U. S. Attorney.

[Endorsed:] Filed Feb. 5th, 1909. A. L. Richardson, Clerk.

[*Order Overruling Demurrer, etc.*]

Journal Entry.

At a Stated Term of the Circuit Court of the United States for the District of Idaho, Held at Moscow, Idaho, on Tuesday, the 11th Day of May, 1909.

Present: Hon. Frank S. Dietrich, Judge.

No. 395.

THE UNITED STATES
vs.
BUNKER HILL & SULLIVAN M. & C. COMPANY.

On this day was announced the decision of the Court upon the demurrer to the complaint herein, heretofore argued and submitted; ordered that said demurrer be and the same is hereby overruled. By agreement defendant is given 60 days from date to answer.

9 In the Circuit Court of the United States, Northern Judicial Circuit, for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY (a Corporation), Defendant.

Amended Answer.

Comes the defendant, Bunker Hill & Sullivan Mining and Concentrating Company, and by leave of court first had and obtained files this its amended answer to the complaint of plaintiff, as follows:

I.

Defendant admits paragraph I of the complaint, and the facts therein stated.

II.

Defendant admits that one W. M. Messinger made homestead entry for the South half (½) of the Northwest quarter (¼) and Lots Three (3) and (4) of Section 4, Township 48, N., R. 2 E., B. M., as alleged in the complaint, but defendant denied that said land was or is non-mineral. Defendant admits that said land was unreserved, and not within the limits of any railroad grant, but defendant alleges the said land was in fact mineral land.

10 III.

Defendant admits that in February, 1906, the said Messinger relinquished his homestead entry to the United States and wholly failed to protect the title thereto under the homestead laws of the United States or at all, but defendant is informed and believes, and upon said information and belief alleges, that at the time said Messinger made the said homestead entry, he believed the said land was agricultural land and continued so to believe until the time of said relinquishment.

IV.

Defendant admits that between the 1st day of April, 1904, and the 31st day of December, 1905, the said Messinger cut down and removed timber and trees standing and growing upon the lands described in the complaint. But defendant denies that said cutting was unlawful or willful. Defendant alleges that said timber was cut in good faith for the purpose of clearing said land in the honest belief that said land was capable of being cultivated and the said timber was cut in order to render the said land fit for cultivation, and only so much was removed thereof as the said Messinger believed was necessary to be removed in the progress and for the purpose of cultivating said land.

Defendant admits that said Messinger manufactured from said timber so cut 2652 linear feet of 6-inch stulls; 394 linear feet of 8-inch stulls; 7220 linear feet of 10-inch stulls, and 2484 linear feet of 12-inch stulls; 888 linear feet of 14-inch stulls; 323 linear
11 feet of 16-inch stulls; and 621.3 cords of wood, and he sold said stulls and said cordwood to defendant, but defendant denies that said Messinger cut or sold to defendant in excess of 2652 linear feet of 6-inch stulls, and denies that he cut or manufactured or sold to defendant in excess of 621.3 cords of wood from said land. And defendant denies that the cutting or manufacturing of said stulls or cordwood was unlawful or willful, but alleges that the said cutting and manufacturing were done in good faith and in accordance with the statutes of the United States and the rules and regulations promulgated by the Secretary of the Interior in accordance therewith. Defendant admits that the value of said stulls per

linear foot and said cordwood per cord at the time and place of delivery to the defendant herein were of the respective values alleged in the complaint, but defendant alleges that the stumpage value of said timber and cordwood so cut at the time of said cutting did not exceed the value of one-half cent per linear foot for the stulls, and 50 cents per cord for the cordwood; and defendant denies that the said Messinger unlawfully or wrongfully converted the said stulls or cordwood for his own use or benefit; and defendant denies that the said Messinger lawfully took or carried away the said timber, stulls or cordwood so felled and cut, and denies that said Messinger unlawfully or wrongfully sold or delivered the said timber, trees or stulls or cordwood so cut to the defendant, the Bunker Hill & Sullivan Mining and Concentrating Company, a corporation. Defendant admits that said Bunker Hill & Sullivan Mining and Concentrating Company received into its possession the said timber, stulls and cordwood to the amount hereinbefore admitted, but denies that the said timber and cordwood were unlawfully or wrongfully cut by the said Messinger, and denies that at the time of receiving the said timber and cordwood, the same were the property of the plaintiff, and defendant denies that the said defendant unlawfully or wrongfully appropriated or converted said stulls and cordwood to its own use or benefit to the damage of the plaintiff in the sum of $3,872.02 or in the damage of the plaintiff in any sum whatever.

Further answering the complaint, the defendant alleges:

1. That one W. M. Messinger, being then a citizen of the United States over the age of twenty-one years, and being then duly qualified to make a homestead entry, and being a bona fide resident of the State of Idaho, did on or about the 18th day of November, 1903, make Homestead Entry No. 1483 in the United States Land Office at Coeur d'Alene, Idaho, for the South half (½) of the Northwest quarter (¼), and Lots Three (3) and Four (4) of Section 4, Township 48, N. Range 2 E., B. M. That at the time of said entry said Messinger entered the same in good faith for homestead purposes, believing that said land was more valuable for agricultural purposes than for mineral or other purposes. That thereafter the said Messinger erected a home upon the said land, moved his family thereon, and established a residence thereon, and proceeded to cut the timber described in the complaint herein in the process of and for the purpose of clearing the land for cultivation; that at the time of said cutting the said Messinger intended to sell the said timber for use in mining; that said land lies on a mountain range, rugged in character, and the said Messinger discovered after cutting the timber described in said complaint from said land that the said land was sterile and rocky without sufficient soil to support or admit of cultivation for purposes of husbandry, and that said land was in fact mineral land, and defendant alleges that said land was and is public mineral land, and was and is situated in the vicinity of large and producing mines, and that said land was not and is not subject to entry under existing laws of the United States except for mineral entry. That the timber cut and

removed from said land was cut and removed in good faith from public mineral land of the United States. That in cutting said timber, stulls and cordwood, the said Messinger complied with the Act of Congress of June 3d, 1878, authorizing citizens and bona fide residents of mineral districts to cut timber on public mineral land, and complied in all respects with the Act of Congress of March 3d, 1891, 26 Statutes, 1093, and the said Messinger in cutting said timber, stulls and cordwood fully complied with all the rules and regulations prescribed by the Secretary of the Interior for the cutting of timber upon public mineral lands in accordance with the Acts of Congress. That said Messinger in cutting said timber used all of each tree cut that could be profitably used, and
14 disposed of the tops, brush and other refuse in such manner as to prevent the spread of forest fires. That said Messinger did not cut any growing trees of any kind whatsoever less than eight inches in diameter, and each and every tree so cut was more than eight inches in diameter. That none of said timbers so cut or removed was transported out of the State of Idaho. That the timber cut and removed from said premises and sold to the defendant as hereinafter alleged consisted of stulls for use in mining purposes. That the quantity and description of said timber so cut is heretofore correctly set forth in paragraph IV of this answer, but the stumpage value of said timber so cut did not exceed one-half cent per linear foot for the stull timber and fifty cents per cord for the cordwood.

2. That the said Messinger in the year 1906 sold and delivered the same to the defendant for use in its mining operations. That the said defendant purchased said timber in good faith and in the honest belief that the said Messinger had lawfully cut the same in accordance with the statutes of the United States, and was authorized to sell the same for use in mining operations. That the defendant paid the said Messinger for the said stulls and cordwood the total sum of $3,251.02, and used the said stulls in the course of its mining operations for the purpose of supporting tunnels, cross-cuts, drifts and stopes through and from which lead and silver ores *was* removed. That the said cordwood so purchased by the defendant was likewise purchased in good faith by the defendant and was
15 used for the purpose of generating steam with which to operate the defendant's said mines. That defendant's said mining operations are conducted on a large scale, and that a large amount of timber is and was necessary to the successful operation of the defendant's mines. That the mine of said defendant is situated near the town of Kellogg, Idaho, and said stull timber and cordwood so purchased from the said Messinger was all used within the State of Idaho near Kellogg, in said State.

Wherefore, defendant prays that it may be hence dismissed with its costs.

MYRON A. FOLSOM.
Spokane, Washington.
J. H. FORNEY.
Moscow, Idaho.

STATE OF IDAHO,
County of Latah, ss:

S. A. Easton, being first duly sworn, deposes and says: That he is an officer, to wit, the General Manager of the defendant company; that he is the only officer of said corporation within the said State of Idaho who is familiar with the facts set forth in the above answer. That he has read the foregoing answer, knows the contents thereof, and the same is true of his own knowledge excepting as to such matters as are stated on information and belief, and as to such matters he believes it to be true.

S. A. EASTON.

Subscribed and sworn to before me this 1st day of Nov., 1909
A. L. RICHARDSON,
Clerk.

16 [Endorsed:] Filed Nov. 1, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY (a Corporation), Defendant.

Motion to Strike [Certain Allegations from the Amended Answer, etc.].

Comes now the plaintiff in the above-entitled action, by C. H. Lingenfelter, United States Attorney for the District of Idaho and attorney for plaintiff, and moves the Court to strike from the amended answer of the defendant the following allegations for the reasons following:

I.

Moves the Court to strike out all that portion of defendant's affirmative defense commencing at the word "that" on page four of said answer, 14th line from the top, to and including the word "wood" in line 17, on page five of said answer, for the reason that the same does not constitute a defense to this action, in that the said affirmative defense attempts to set up the mineral character of the land where the answer of the defendant admits that the land
17 in question was entered as a homestead and that the timber was cut from said land while claimed as a homestead. On the hearing of this motion plaintiff will use this motion and all records and files in the above cause or so much thereof as may be necessary.

C. H. LINGENFELTER,
United States Attorney for Idaho, and Attorney for Plaintiff.

[Endorsed:] Filed Nov. 1, 1909. A. L. Richardson, Clerk.

[*Order Denying Motion to Strike Part of Amended Answer, etc.*]

Journal Entry.

At a stated term of the Circuit Court of the United States for the District of Idaho, held at Moscow, Idaho, on Monday, the 1st day of November, 1909. Present: Hon. Frank S. Dietrich, Judge.

No. 395.

THE UNITED STATES OF AMERICA
vs.
THE BUNKER HILL & SULLIVAN M. & C. COMPANY.

Now came the plaintiff by C. H. Lingenfelter, U. S. District Attorney, and moved the Court to strike out part of defendant's Amended Answer herein and for judgment on the pleadings, which motion was opposed by counsel for defendant, and upon consideration the Court ordered that said motion to strike out part of
18 the Amended Answer and said motion for judgment upon the pleadings be and each is hereby denied.

United States Circuit Court, Northern Division, District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY, Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess the damages at the sum of $3,397.22.

M. H. DAGGETT,
Foreman.

[Endorsed:] Filed Nov. 3, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. (a Corporation), Defendant.

19 *Judgment.*

Now on this day this cause came on to be heard, C. H. Lingenfelter, United States Attorney for the District of Idaho, appearing for the plaintiff, and Myron A. Folsom and James H. Forney ap-

pearing for the defendant, a jury having been duly impaneled to try the cause and the matter having been duly presented, now on this day the jury duly returned its verdict into court to the effect that we, the jury in the above-entitled cause, find for the plaintiff and assess the damages to be awarded to the said plaintiff in the sum of Three Thousand Three Hundred and Ninety-seven Dollars and Twenty-two cents ($3,397.22), and the Court being fully advised in the premises:

It is hereby ordered, adjudged and decreed that the plaintiff, The United States of America, do have and recover from the above-named defendant, Bunker Hill & Sullivan Mining and Concentrating Company, a corporation, the sum of $3,397.22 and its costs in this behalf expended as allowed by law, in the sum of $201.87.

Dated this 3d day of November, A. D. 1909.

I, A. L. Richardson, Clerk of the above-entitled court, do hereby certify that the above and foregoing is a true and correct copy of the judgment entered in the above-entitled cause in Book 2 of Judgments, at page 217.

20 In witness whereof I have hereunto set my hand and the seal of this court this 3d day of November, A. D. 1909.

[SEAL.] A. L. RICHARDSON, *Clerk.*

[Endorsed:] Filed Nov. 3d, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court, District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that on the trial of this cause in this court at the October term, A. D. 1909, of said court, the Honorable Frank S. Dietrich presiding, the following proceedings were had, to wit:

A jury was impaneled and sworn according to law, and thereupon the plaintiff moved to strike from the defendant's amended answer all that portion following the words "Further answering the complaint," being that portion containing the alleged defense that the land from which the timber was cut was public mineral land, and that the timber was cut for mining purposes pursuant to the

21 Act of June 3d, 1878, and the regulations thereunder. The Court denied the said motion, to which plaintiff excepted.

Thereupon plaintiff to sustain the issue upon its part offered the testimony of four witnesses, which said testimony supported each and every allegation of the complaint not admitted by the amended answer.

At the close of the foregoing evidence in chief offered by the plaintiff, the defendant to sustain the issues upon its part, offered the testimony of nine witnesses and certain exhibits, which testimony and exhibits were to the following effect:

[*Testimony of M. J. Sinclair for the Defendants.*]

One M. J. SINCLAIR testified that he had been familiar with the property from which the timber involved in this action was cut since the year 1887; that at that time he made certain mining locations in the immediate vicinity of the premises here involved and on some of the mining claims in the near vicinity of this land galena ore of very high grade was discovered; that upon this land he knew at that time at least one mining claim was located, although he personally did not visit it; that timber had been cut from the land by various individuals from the year 1887 until the year 1905. That the land from which the timber in controversy was cut was mineral land, and was in a mining district which had produced large quantities of silver-lead ore. He testified further that during the month of October of the present year he had visited the ground in dispute, and that he found extensive mining works upon the property
22 which must have cost about $10,000; that there were well-defined veins upon the property carrying silver and copper. He saw that a great deal of timber had been cut from the premises, but saw no stumps less than eight inches in diameter excepting along the right of way of a telephone line which crossed the premises. This telephone line was built about two years prior to this trial.

[*Testimony of W. M. Messinger, for the Defendant.*]

W. M. Messinger testified that he was a native-born citizen of the United States, and since prior to 1903 had been a citizen and resident of the State of Idaho; that he entered the land as a homestead in November, 1903. That he went upon the land for the purpose of making it his home. He moved his family thereon in March, 1904, and remained until September or October. There was no water upon the land and he was required to haul it. That the nearest school was at Kingston, three miles away. That he had a family consisting of a wife and three children, and his family refused to live there longer, and had moved to the town of Kellogg, Idaho. In March, 1905, he returned to the place and lived there until September or October of that year. That his purpose in filing a homestead upon said land was to make it a home and to clear the land for cultivation and for a pasture. That he thought about forty or fifty acres could be plowed. That most of the balance could be used for pasture, but some of it was pretty steep for that
23 purpose; some grass grows upon it. That he sowed some oats on a small patch of ground and scattered grass seed over a small portion of the balance. He testified further that he purchased a relinquishment of the premises before filing on the same

and paid $150; that there was a cabin on the place at the time and he built an addition thereto. That in the winter of 1905-6 he sold his relinquishment and moved away because he determined he could not make a living on the place, and for that reason that he had a contract at Osborn, Idaho, to cut and furnish timber for other parties. That in clearing the land he had cut certain timber for stull timber, none of which was less than eight inches in diameter at the bottom. That he had left the tops and brush where they fell, but for the most part it was very scattering and so far as he knew no fire had crossed the place since that time. That in cutting cordwood he had cut everything large and small, whether less than eight inches or larger. That he had used all of each tree that could profitably be used. He testified that the land was mountainous and sterile and not fit for cultivation. That upon about fifteen acres of the tract, he cut everything, both large and small, but upon the balance he cut only that which was large enough for stulls.

[*Testimony of the Witness McKinnon, for the Defendant.*]

The witness McKinnon testified that he was a miner by occupation; that he had gone upon the premises in controversy and worked on certain mining claims owned by his brother and other in-
24 dividuals and had lived in a cabin near the mining works; that he had remained there since the year 1907 working continuously. That about 950 feet of mining work consisted of tunnels and shafts had been run and they showed well-defined veins containing mineral-bearing rock.

[*Testimony of Messrs. Easton, Sterling, Dunn, Robinson, and Bittner, for the Defendant.*]

The other witnesses, Easton, Sterling, Dunn, Robinson, and Bittner all testified that the land was mineral land. From their testimony it appeared that the Bunker Hill & Sullivan Company's and the Federal Mining & Smelting Company's mines which had produced large quantities of silver-lead ore were about two miles distant; that the Corrigan mine on which more than $10,000 had been spent in developments, and which contained a body of ore was near the property from which the timber had been cut. That the property from which the timber was taken was mineral land and contained well-defined veins carrying copper and silver. That about $10,000 worth of development work had been done upon the property and that nearly the entire land in controversy had been covered by mining locations. That there was no brush or tops on the place which were likely to give rise to fire, and that they had observed no stumps on the place less than eight inches in diameter. That along the right of way of a telephone line there was brush which had been left there by the telephone company, the line having
25 been put through about two years before the trial.

The witness Easton testified that he had been familiar with

the land since 1903. That no fire had crossed the land since that time. He further testified that the six-inch stulls purchased from Messenger were six inches in diameter at the small end and at the bottom and they were not less than ten inches in diameter. He testified further that the stumpage value in 1904 and 1905 of cordwood was 50 cents per cord and the stumpage value of stull timber was one-half cent per linear foot. He testified that he had sold stumpage on that basis at that time. He also testified that he purchased the timber to the amount described in the answer from W. M. Messenger in the years 1904 and 1905, and all of said timber was used within the state of Idaho by the defendant in its mining operations.

[*Recital Relative to Exhibits Introduced by the Defendant.*]

Defendant introduced as exhibits certain maps showing the position of the mining claims upon the land in controversy and showing the position of the land with reference to the producing mines of Yreka Mining District, Shoshone County, Idaho. Photographs were introduced showing the character of the surface of the ground, the mining works therein, and the face of a drift in the property showing a mineral vein in place. Other exhibits were introduced, consisting of ore taken from the property, which the witness testified showed by inspection copper, iron and silver. Defendant
26 also introduced certified copies of location notices of claims located, one in 1896, upon which, however, no work had been done for a great many years, one in 1906, and four located in 1907, by various individuals upon the land from which the timber was cut.

[*Recital Relative to Plaintiff's Offers in Evidence, etc.*]

Thereupon defendant rested its case, and plaintiff offered certain evidence in rebuttal, to the effect that timber had been cut all over the property in dispute, and that there was other timber in the immediate vicinity of this particular place which was in danger of fire; that the brush left on the property in controversy had been so left as to spread forest fires; also evidence tending to show the stumpage value and the value of timber after it had been felled; also that Messenger had a contract to sell the timber in question to the defendant, which contract had been entered into after he had filed upon the land, but prior to the time that he moved his family thereon. There was no evidence that Messenger had any immediate need for pasture, nor was there any evidence as to how or for what purpose, or for whose stock, any pasture was to be used.

[*Recital Relative to Plaintiff's Motion to Take from the Jury Certain Evidence, etc.*]

This was all the evidence in the case, and at the conclusion the plaintiff moved the Court to take from the jury all evidence offered

by the defendant to sustain its defense that the land was
27 mineral land and that the timber had been cut from mineral land by a citizen of the United States under the act of June 3, 1878, and the rules of the Secretary of the Interior made in pursuance thereof, upon the ground that the said Messenger having filed a homestead entry upon the land prior to the cutting of said timber was precluded from showing that the said timber was cut from mineral land for use in the state of Idaho for mining purposes; and upon the further ground that it appeared from the evidence that the rules of the Secretary had not been complied with with reference to the size of timber to be cut, in that some timber had been cut less than eight inches in diameter. After argument, the Court granted said motion, and instructed the jury not to consider the evidence offered by defendant to sustain said defense, upon the ground that said land having been filed upon as a homestead and under such filing being in the possession and occupation of Messenger, who was claiming the right to occupy the same as a homestead during the time the timber was being cut, the same was not public land, and for the further reason that it appeared from the evidence of both parties without conflict that at least as to the fifteen acres from which all of the timber was cut, both large and small, the rules of the Secretary of the Interior prescribing what timber could be cut from mineral lands had been violated in that timber less than eight inches in diameter had been cut; and that the defendant, as a purchaser from Messenger, had no better right to make such defense than Messenger himself.

28 To this ruling of the Court defendant duly excepted, its exceptions being allowed.

[*Instructions of the Court to the Jury, etc.*]

Thereupon the attorneys for the respective parties addressed the jury, after which the Court instructed the jury at length with reference to the rights of a homesteader to cut and sell timber from a homestead for the purpose of clearing the same for cultivation, and the measure of damages in the event that the jury should find that the timber had been cut unlawfully, which said detailed instruction advised the jury that a homesteader had the right to cut and remove the timber and do with it what he pleased so fast as was reasonably necessary for the purpose of clearing the land and making it available for agricultural purposes, the Court emphasizing the obligation of the homesteader while so doing to act in good faith, with due regard for his own needs and the rights of the United States so long as the latter held legal title. In the course of such instructions, and after advising the jury of the principles which should control the conduct of a homesteader, the Court, referring to the defense that Messenger contemplated using that portion of the entry from which the timber had been cut only for stulls, for pasture, gave the following instruction:

"Now, cultivation, of course, may involve different conditions, different circumstances. Sometimes it might mean the planting of

an orchard, sometimes the growing of alfalfa, sometimes the growing of wheat or oats, and sometimes the production of grass

29 I do not say to you that the production of grass is not a legitimate purpose, but where a homesteader clears a large amount of land, much larger than is necessary for plowing, and claims that he is doing that for the purpose of pasture merely, you should scrutinize what he says in that respect, and what he has done in that respect, carefully, for the purpose of seeing whether or not he is really acting in good faith, for, as you must see, it would be easy to resort to that method as a mere pretext or cover for fraud."

To which instruction the defendant then and there duly excepted, and particularly to that part which advised the jury that it would be easy to resort to that method as a mere pretext or cover for fraud, upon the ground that such instruction was against the law, and influenced the jury unduly to believe that said Messenger acted in bad faith; and the defendant likewise, in the presence of the jury, and before the jury retired, excepted to the refusal of the Court to submit to the jury the evidence to support the defense that the land from which the timber was cut was mineral land, not suitable for entry under other laws than the mineral laws, and that the timber had been cut by a bona fide resident for use in mining, said cutting having been done in accordance with the act of June 3, 1878, and other valid rules.

Thereupon the jury retired for deliberation and returned the following verdict:

30 "United States Circuit Court, Northern Division, District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
THE BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY, Defendant.

Verdict [in Bill of Exceptions].

We, the jury in the above-entitled cause, find for the plaintiff and assess the damages at the sum of $3,397.22.

M. H. DAGGETT, *Foreman.*

[Endorsed:] No. 395. Title. Verdict for Plaintiff. Filed Nov. 3, 1909. A. L. Richardson, Clerk."

[*Recital Relative to Motion for Judgment Notwithstanding the Verdict, etc.*]

The defendant excepted to the said verdict and moved the Court for a judgment in favor of the defendant notwithstanding the verdict, on the ground that the undisputed evidence showed that said timber cutting had been done in pursuance of the Act of June 3d,

1878, and the regulations thereunder. The Court denied said motion and the defendant excepted.

Thereafter, and on the same day, the Court made and entered judgment in favor of the plaintiff in the sum of $3,397.22 and costs.

31 [*Order Settling, etc., Bill of Exceptions.*]

The foregoing bill of exceptions, duly and within the time allowed by law, proposed by the defendant, is hereby, after certain alterations in and additions thereto, duly settled and allowed as defendant's bill of exceptions, it being certified that the same correctly states sufficient of the record for a full and fair consideration of exceptions taken by the defendant and therein noted.

Dated this 1st day of December, 1909.

FRANK S. DIETRICH,
United States District Judge Who Alone Presided at the Trial of Said Cause.

[Endorsed:] Filed December 2, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court for the District of Idaho, Northern Division.

At Law.

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Petition for Writ of Error.

32 And comes now the plaintiff in error, Bunker Hill and Sullivan Mining and Concentrating Company (defendant in the action), and says that on or about the 3d day of November, 1909, the Circuit Court entered a judgment herein in favor of the plaintiff, United States of America, and against this defendant, Bunker Hill and Sullivan Mining and Concentrating Company, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error which is attached and filed with this petition.

Wherefore, this defendant prays that writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

MYRON A. FOLSOM,
J. H. FORNEY,
Attorneys for the Defendant, Bunker Hill & Sullivan Mining and Concentrating Company.

Order Allowing Writ of Error.

On consideration of the foregoing petition and assignment of errors attached thereto, the Court does allow the writ of error of the defendant, Bunker Hill & Sullivan Mining and Concentrating Company, upon giving bond according to law in the sum of
33 Five Thousand Dollars ($5,000) which shall operate as a supersedeas bond.

Dated this 2d day of December, 1909.

FRANK S. DIETRICH,
United States District Judge for the District of Idaho, Who Tried Said Cause and Entered Said Judgment.

Assignment of Errors.

Plaintiff in error, Bunker Hill & Sullivan Mining and Concentrating Company, hereby assigns the following errors committed by the trial court:

I.

The Circuit Court erred in entering judgment for plaintiff herein for the sum of $3,397.02, with interest and costs upon the verdict of the jury herein and erred in entering judgment on the said verdict.

II.

The Circuit Court erred in withdrawing from the jury all evidence tending to support the defense that the timber in question had been cut by a citizen and bona fide resident of the State of Idaho, from mineral land not subject to entry under other than the mining laws, said timber being used within the State of Idaho for mining in accordance with the Act of June 3d, 1878, and the rules of the Secretary of the Interior.

III.

The Circuit Court erred in denying to defendant in the Court below the benefit of the second defense set forth in its answer.

34 IV.

The Circuit Court erred in denying defendant's motion to enter a judgment for defendant notwithstanding the verdict.

V.

The Circuit Court erred in giving the following instruction to the jury:

"Now, cultivation of course may involve different conditions, different circumstances. Sometimes it might mean the planting of an orchard, sometimes the growing of alfalfa, sometimes the growing

of wheat or oats, and sometimes the production of grass. I do not say to you that the production of grass is not a legitimate purpose, but where a homesteader clears a large amount of land, much larger than is necessary for plowing, and claims that he is doing that for the purpose of pasture merely, you should scrutinize what he says in that respect, and what he has done in that respect, carefully, for the purpose of seeing whether or not he is really acting in good faith, and, as you must see, it would be easy to resort to that method as a mere pretext or cover for fraud."

The following portion of said instruction was error:

"Where a homesteader clears a large amount of land, much larger than is necessary for plowing, and claims that he is doing it for the purpose of pasture merely, you should scrutinize what he says in that respect and what he has done in that respect, carefully for the purpose of seeing whether or not he is really acting in
35 good faith, and as you must see, it would be easy to resort to that method as a mere pretext or cover for fraud."

The said portion of the instruction was excepted to and is erroneous because it unduly emphasized that Messenger's testimony might be untrue, and improperly advised the jury that a plan to use land for pasture is more likely to be conceived in fraud than the plan to use land for the raising of crops.

Wherefore, plaintiff in error prays that the said judgment of the Circuit Court be reversed and said Circuit Court either be ordered to enter judgment dismissing the action, or grant a new trial.

MYRON A. FOLSOM,
J. H. FORNEY,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed Dec. 2, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Supersedeas and Cost Bond on Writ of Error.

Know all Men by These Presents: That we, the Bunker Hill and Sullivan Mining and Concentrating Company, a corporation,
36 as principal, and the Fidelity & Deposit Company of Maryland (a corporation organized under the laws of the State of Maryland for the purpose of doing business as a surety, which said last named corporation has complied with the statutes of the United States authorizing it to become a surety of bonds in the Courts of the United States), as surety, are held and firmly bound unto the United States of America, for the just and full sum of

Fifty-two Hundred Dollars ($5,200), to be paid unto the said above-named United States of America, its attorneys, officers or assigns, to which payment well and truly to be made we bind ourselves, our successors and our assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 4th day of December, in the year of our Lord, 1909.

Upon the conditions that: Whereas, lately at a session of the Circuit Court of the United States for the District of Idaho, in a suit pending in said court between the United States of America, and the Bunker Hill & Sullivan Mining and Concentrating Company, a corporation, a judgment was rendered against said defendant upon the verdict of the jury in the sum of $3,397.02 and costs amounting to $201.87; and

Whereas, said defendant conceiving itself aggrieved thereby has obtained from said court a writ of error to reverse and correct said judgment in that behalf and a citation directed to the said above-named plaintiff admonishing said plaintiff to be and appear at the
37 United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within the time therein fixed; and

Whereas, an order has been entered requiring said defendant to file supersedeas bond in the sum of Five Thousand Dollars ($5,000) and a cost bond in the sum of Two Hundred Dollars ($200):

Now, the condition of the above obligation is such that if the said Bunker Hill & Sullivan Mining and Concentrating Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fails to make its plea good in said court, then the above obligation to be void; otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a supersedeas bond.

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY.

By M. A. FOLSOM, *Its Agent and Attorney, and*
FIDELITY DEPOSIT COMPANY OF MARYLAND.

By JAS. A. WILLIAMS, *Attorney in Fact.*

Attest:

[SEAL.] W. S. McCUA, *General Agent.*

The foregoing bond is hereby approved this 6th day of December, 1909, and the same when filed shall operate both as a bond for costs on appeal and as a supersedeas bond.

FRANK S. DIETRICH, *Judge.*

38 [Endorsed:] Filed Dec. 4th, 1909. A. L. Richardson, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Writ of Error [Original].

THE UNITED STATES OF AMERICA,
Ninth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court, before you or some of you, between the United States of America, plaintiff, and the Bunker Hill & Sullivan Mining and Concentrating Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said defendant, the Bunker Hill & Sullivan Mining and Concentrating Company, a corporation, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment
39 be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Francisco on the 4th day of January, 1910, in said Circuit Court of Appeals, for the Ninth Circuit, to be then and there held, that the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of December, in the year of our Lord one thousand nine hundred and nine.

[SEAL.] A. L. RICHARDSON,
Clerk U. S. Circuit Court for the District of Idaho.

Allowed by—

FRANK S. DIETRICH, *Judge.*

[Endorsed:] (Original.) No. 395. In the Circuit Court of the United States for the District of Idaho. Bunker Hill & Sullivan M. & C. Co., Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed Dec. 6th, 1909. A. L. Richardson, Clerk.

40 *Citation on Writ of Error (Original).*

UNITED STATES OF AMERICA,
District of Idaho, ss:

To the United States of America, and to Its Attorney, C. H. Lingenfelter, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, District of Idaho, wherein Bunker Hill & Sullivan Mining and Concentrating Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Boise in said District, this 6th day of December, 1909.

FRANK S. DIETRICH, *Judge.*

Service of the foregoing Citation by copy admitted this 6th day of December, 1909.

C. H. LINGENFELTER, *U. S. Att'y.*

[Endorsed:] (Original.) No. 395. In the United States Circuit Court for the District of Idaho, Northern Division. Bunker Hill & Sullivan M. & C. Co., Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error.
41 M. A. Folsom, Attorney for Pl'ff in Error, Empire State Building, Spokane, Wash. Filed on return Dec. 6, 1909. A. L. Richardson, Clerk.

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:
[SEAL.] A. L. RICHARDSON, *Clerk.*

[*Certificate of Clerk U. S. Circuit Court to Transcript of Record.*]

In the United States Circuit Court, Ninth Judicial Circuit, District of Idaho.

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 40 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-
42 entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $32.70, and that the same has been paid by the plaintiff in error.

Witness my hand and seal of said court this 6th day of December, 1909.

[SEAL.] A. L. RICHARDSON, *Clerk.*

[Endorsed:] No. 1799. United States Circuit Court of Appeals for the Ninth Circuit. The Bunker Hill & Sullivan Mining and Concentrating Company (a Corporation), Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Northern Division.

Filed December 13, 1909.

F. D. MONCKTON, *Clerk.*

43 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1799.

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-two (42) pages, numbered from and including one (1) to and including forty-two (42), to be a true copy of the printed Transcript of Record upon Writ of Error to the United States Circuit Court

for the District of Idaho, Northern Division, in the above-entitled cause, as the original and copies of the said Printed Transcript of Record were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twentieth day of June, A. D. 1910.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

44 & 45 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1799.

THE BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY, a Corporation, Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

ADDENDA.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

Names and Addresses of Attorneys of Record.

Counsel for Plaintiff in Error: Myron A. Folsom, Paulsen Building, Spokane, Washington; J. H. Forney, Moscow, Idaho.

Counsel for Defendant in Error: C. H. Lingenfelter, United States Attorney, Boise, Idaho.

46 At a stated term, to wit: the October Term, A. D. 1909 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Thursday the seventeenth day of February in the year of our Lord one thousand nine hundred and ten.

Present:

Honorable William B. Gilbert, Circuit Judge.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 1799.

THE BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Order of Submission.

Ordered, above-entitled cause argued by Mr. Myron A. Folsom, counsel for the plaintiff in error, and by Mr. United States Attorney C. H. Lingenfelter, counsel for the defendant in error, and submitted to the Court for consideration and decision with leave to counsel for the plaintiff in error to file a reply-brief.

47 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1799.

THE BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Opinion U. S. Circuit Court of Appeals upon Writ of Error to the United States Circuit Court for the District of Idaho, Northern Division.

Before Gilbert, Ross and Morrow, Circuit Judges.

Ross, *Circuit Judge*, delivered the opinion of the court:

The Government brought this action in the court below against the Bunker Hill and Sullivan Mining and Concentrating Company to recover the value of certain timber cut by one Messinger from public land in Shoshone County, Idaho, upon which he had previously filed and then had a homestead claim. The verdict recovered was for the value of the timber in its manufactured state. After cutting the timber and selling it to the company for use in its

mining operations, Messinger relinquished his homestead entry. The company by its answer filed in the cause admitted the purchase of the timber from Messinger, and alleged that the latter had cut the same from his homestead in pursuance of a plan to cultivate and pasture the land, and in the belief that it was fit for agri-
48 culture. As a second defense the company alleged that notwithstanding Messinger believed to the contrary at the time he made his homestead entry, the land from which the timber was cut was not suitable for agriculture, but was, in fact, mineral land, and consequently not subject to entry under any law other than those relating to mineral lands. The answer further alleged that Messinger was a citizen and bona fide resident of the state of Idaho, and had cut the timber under and by virtue of the act of Congress of June 3, 1878, which provided, among other things, "that all citizens of the United States, and other persons bona fide residents of the states of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana, and all other mining districts of the United States, shall be and are hereby authorized and permitted to fell and remove for building, agricultural, mining, or other domestic purposes, any timber or other trees, growing or being on the public lands, said lands being mineral and not subject to entry under existing laws of the United States except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time bona fide residents", and in accordance with the regulations of the Secretary of the Interior made thereunder.

The trial was before the court with a jury. Evidence was introduced on the part of the defendant tending to show good faith on the part of Messinger in cutting the timber, and in support of its second defense the company offered evidence of the alleged citizenship and residence of Messinger, and tending to show that the land from which he cut the timber was mineral land, and that the timber was used by the defendant for mining purposes within the state of Idaho, and that the cutting had been done in compliance with the rules of the Secretary of the Interior.

49 Upon the conclusion of the evidence the trial court, upon motion of the counsel for the plaintiff, withdrew from the consideration of the jury all of the evidence introduced by the defendant in support of its said alleged second defense, which constitutes the main ground relied upon by the plaintiff in error for a reversal of the judgment. The court permitted the case to go to the jury upon the alleged good faith of Messinger in clearing the land for cultivation, advising the jury of the principles which should control the conduct of a homesteader, and, in referring to the claim that Messinger contemplated using that portion of his homestead entry from which he had cut timber for stulls, for pasture, gave the following instruction, which is also complained of here:

"Now, cultivation, of course, may involve different conditions, different circumstances. Sometimes it might mean the planting of an orchard, sometimes the growing of alfalfa, sometimes the growing of wheat, or oats, and sometimes the production of grass. I do not say

to you that the production of grass is not a legitimate purpose, but where a homesteader clears a large amount of land, much larger than is necessary for planting, and claims that he is doing that for the purpose of pasture merely, you should scrutinize what he says in that respect, and what he has done in that respect carefully, for the purpose of seeing whether or not he is really acting in good faith, for, as you must see, it would be easy to resort to that method as a mere pretext or cover for fraud."

The case shows that the land upon which the timber was cut stood upon the books of the Land Department of the Government as public land open to homestead entry, and as such was entered by Messinger, who went into its possession and claimed the right to cut the timber in question to enable him to cultivate the land and to make other uses of it under and in pursuance of the beneficent provisions of the homestead law. One of the requirements of the oath he was compelled to take in making his entry was the declaration of his intention to occupy the land as a homestead and cultivate the same. While thus availing himself of the bounty of the Government and occupying that relating to it, he could not legally commit any act upon or in respect to the land in contravention of the provisions of the law under which he held its possession, and neither he, nor any one claiming under him, can justify his illegal act by saying that although he could not cut the Government's timber and sell it for mining purposes under the provisions of the law under which he was permitted to go into and hold possession of the land, yet, under another law in no way at the time applicable to this particular land, persons were permitted to cut timber for mining purposes. We are of the opinion that the court below was clearly right in its ruling respecting the second defense interposed by the defendant. Nor do we see any error in its instruction to the jury to scrutinize carefully the pleaded defense of good faith in Messinger in order to determine whether or not his acts were really prompted by the motives claimed by the defendant.

The judgment is affirmed.

(Opinion filed May 2, 1910. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.)

51 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1799.

THE BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY, a Corporation, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Idaho, Northern Division.

Judgment U. S. Circuit Court of Appeals.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Idaho, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

[Endorsed:] Judgment. Filed and entered May 2, 1910. F. D. Monckton, Clerk.

52 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1799.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY, a Corporation, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Petition for (and Order Allowing) Writ of Error (to Supreme Court U. S.).

Your petitioner, Bunker Hill and Sullivan Mining and Concentrating Company, plaintiff in error, in the above-entitled cause, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment has therein been rendered on the 2nd day of May, 1910, affirming the judgment of the Circuit Court of the United States for the District of Idaho, Northern Division, and that the matter in controversy in said suit exceeds One Thousand Dollars ($1000.00), besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any way upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws,

nor the criminal laws, and that it is not an admiralty case,
53 and that it is a proper case to be reviewed by the Supreme Court of the United States upon a writ of error, and therefore your petitioner would respectfully pray that a writ of error be allowed in the above-entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed and, if error be found, corrected according to the laws and customs of the United States.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,
Plaintiff in Error.
By MYRON A. FOLSOM, *Its Attorney.*

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of Five Thousand, Two Hundred Dollars ($5,200.00), which bond when given shall operate both as a supersedeas bond and as a cost bond.

Dated this 16 day of May, A. D. 1910.

ERSKINE M. ROSS,
United States Circuit Judge.

[Endorsed:] Petition for and Order Allowing Writ of Error to Supreme Court U. S. Filed May 16, 1910. F. D. Monckton, Clerk.

54 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1799.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Assignment of Errors (on Writ of Error to Supreme Court U. S.).

Now comes the Plaintiff in Error, Bunker Hill and Sullivan Mining and Concentrating Company, by Myron A. Folsom, its attorney, and says, that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the District of Idaho, Northern Division, for Three Thousand, Three Hundred and Ninety-seven and 02/100 Dollars ($3,397.02)

and costs amounting to Two Hundred and One and 87/100 Dollars ($201.87), entered on May 2nd, 1910, in favor of said defendant in error and against said plaintiff in error.

55 Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid and in not remanding said cause to said Circuit Court for a new trial.

Third. Said Circuit Court of Appeals erred in not sustaining the second assignment of error upon the record in said cause.

Fourth. Said Circuit Court of Appeals erred in not sustaining the third assignment of error in said cause.

Fifth. Said Circuit Court of Appeals erred in holding that the said Circuit Court correctly withdrew from the jury all evidence tending to support the defense that the timber in question in the action had been cut by a citizen and bona fide resident of the State of Idaho from mineral land not subject to entry under other than the mining laws, said timber being used within the State of Idaho for mining purposes in accordance with the Act of June 3rd, 1878, and the rules of the Secretary of the Interior.

Sixth. Said Circuit Court of Appeals erred in depriving the plaintiff in error of the benefit of the defense prescribed by Section 8 of the Act of Congress of June 3rd, 1891, relating to defenses in suits for the cutting of timber upon public lands.

Wherefore, the said Bunker Hill and Sullivan Mining and Concentrating Company, the Plaintiff in Error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled

56 cause to the prejudice of the plaintiff in error the said judgment of the United States Circuit Court of Appeals be reversed and annulled and for naught esteemed, and that said cause be remanded to the United States Circuit Court for the District of Idaho, Northern Division, with instructions to grant a new trial in said cause or for such further proceedings in said cause as may be determined upon by this Honorable Court to the end that justice may be done in the premises.

MYRON A. FOLSOM,
Attorney for Plaintiff in Error.

(Endorsed:) Assignment of Errors on Writ of Error to Supreme Court U. S. Filed May 16, 1910. F. D. Monckton, Clerk.

57 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1799.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY, a Corporation, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Supersedeas and Cost Bond on Writ of Error (to Supreme Court U. S.).

Know all men by these presents, that we, Bunker Hill and Sullivan Mining and Concentrating Company, a corporation, as Principal, and the Fidelity and Deposit Company of Maryland (a corporation organized under the laws of the State of Maryland for the purpose of doing business as a surety, which said last named corporation has complied with the statutes of the United States authorizing it to become a surety of bonds in the Courts of the United States), as Surety, are held and firmly bound unto the United States of America in the just and full sum of Five Thousand, Two Hundred Dollars ($5,200.00), to be paid unto the said above named United States of America, its attorneys, officers or assigns, to which payment well and truly to be made we bind ourselves, our successors and our assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of May, A. D. 1910.

58 Whereas, lately at a session of the Circuit Court of Appeals for the Ninth Circuit, in a suit pending in said court between the Bunker Hill and Sullivan Mining and Concentrating Company, plaintiff in error, and The United States of America, defendant in error, a judgment was rendered against the said Bunker Hill and Sullivan Mining and Concentrating Company, and the said Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing said United States of America to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington within thirty days from the date hereof;

Now, the condition of the above obligation is such that if the said Bunker Hill and Sullivan Mining and Concentrating Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good in said Court, then the

above obligation to be void, otherwise to remain in full force and virtue.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,
By MYRON A. FOLSOM,
Its Attorney.

[SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By JAMES W. MOYLES,
Its Attorney in Fact.

59 Approved by—
ERSKINE M. ROSS,
United States Circuit Judge.

(Endorsed:) Supersedeas and Cost Bond on Writ of Error (to Supreme Court U. S.). Filed May 24, 1910. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

60 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1799.

THE BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and Transcript of Record upon Writ of Error from the Supreme Court of the United States.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixteen (16) pages, numbered from and including one (1) to and including sixteen (16), to be a true copy of the Assignment of Errors and of all Proceedings had in the above-entitled case in the said United States Circuit Court of Appeals for the Ninth Circuit, including the Opinion filed therein, as the same remain on file and of record in my office, and that the same in connection with the preceding Certified Copy of the Printed Transcript of Record, constitute a true copy of the complete record in the above-entitled case and the Transcript of Record upon return to the annexed writ of error.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twentieth day of June, A. D. 1910.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between the Bunker Hill & Sullivan Mining and Concentrating Company, a Corporation, Plaintiff in Error, and the United States of America, Defendant in Error, a manifest error hath happened, to the great damage of the said the Bunker Hill & Sullivan Mining and Concentrating Company, a corporation, Plaintiff in Error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, in the District of Columbia, within sixty days from the date hereof, in the said the Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of May, in the year of our Lord One Thousand, Nine Hundred and Ten.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

(Allowed by Honorable Erskine M. Ross, United States Circuit Judge, by order filed May 16, 1910.)

62 [Endorsed:] Docketed. No. 1799. United States Circuit Court of Appeals for the Ninth Circuit. The Bunker Hill & Sullivan Mining and Concentrating Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed May 24th, 1910. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Return to Writ of Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the Within Writ of Error.

As within we are commanded, we certify under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 24th day of May, A. D. 1910, duly lodged in the cause in this Court for the within named defendant in error.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

By the Court:

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

63 United States Circuit Court of Appeals for the Ninth Circuit.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY, a Corporation, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Citation to Defendant in Error.

THE UNITED STATES OF AMERICA, ss:

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein the Bunker Hill and Sullivan Mining and Concentrating Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand this 24 day of May, in the year of our Lord one thousand nine hundred and ten.

ERSKINE M. ROSS,
United States Circuit Judge for the Ninth Circuit.

Copy of writ served on this 31st day of May, A. D. 1910.

C. H. LINGENFELTER,
Attorney for The United States of America, Defendant in Error.

64 [Endorsed:] Docketed. Original. No. 1799. In the United States Circuit Court of Appeals for the Ninth Circuit. Bunker Hill & Sullivan Mining & Concentrating Company, Plaintiff in Error, vs. The United States of America, Defendant in Error. Citation to Defendant in Error. Services of the within Citation is hereby acknowledged this 31st day of May, 1910. C. H. Lingenfelter, Attorney for Defendant in Error. M. A. Folsom, Attorney for Plff in Error, Paulsen Bldg., Spokane, Wash. Filed Jun- 17, 1910. F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

Endorsed on cover: File No. 22,256. U. S. Circuit Court of Appeals, 9th Circuit. Term No. 101. The Bunker Hill and Sullivan Mining and Concentrating Company, plaintiff in error, vs. The United States. Filed July 12th, 1910. File No. 22,256.

FILED.
OCT 5 1912
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court

OF THE

United States

October Term, 1912

No. 101

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA.
Defendant in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

MYRON A. FOLSOM,
Counsel for Plaintiff in Error.

FRANKLIN PRESS, SPOKANE

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IN THE

Supreme Court

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United States

October Term, 1912

No. 101

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

FACTS.

This action was brought by the United States to recover from the Bunker Hill & Sullivan Mining and

Concentrating Company the value of certain timber purchased from one Messinger who had cut it from land in Shoshone County, Idaho, upon which he had previously filed a homestead.

By its amended answer, the company admitted the purchase of the timber, and alleged that Messinger had cut the timber in good faith from his homestead in pursuance of a plan to cultivate and pasture the same, and in the belief that the land was fit for agriculture. As a second defense, the company alleged that notwithstanding Messinger believed to the contrary at the time he made his homestead entry, the land from which the timber had been cut was in truth and fact mineral land not subject to entry under any laws other than the mineral laws, and not suitable for agriculture. The answer further alleged that Messinger was a citizen and *bona fide* resident of the State of Idaho and had cut the timber in accordance with the Act of Congress of June 3rd, 1878, and the regulations of the Secretary of the Interior and that the timber had been sold to defendant company for use in its mining operations at Kellogg, Idaho. At the trial, the plaintiff moved to strike from the amended answer the second defense, but the court denied the motion. Evidence was introduced tending to support the allegations of the complaint, and evidence

was introduced by the defendant to show the good faith of the cutting; and in support of the second defense evidence was offered of the citizenship of Messinger, and of the fact that the land was mineral and contained valuable veins of rock carrying copper, silver and lead; and evidence was offered that the timber was used for mining purposes within the state, and that the cutting had been done in compliance with the rules of the Secretary.

The testimony as to the mineral character of the land, the citizenship of Messinger and the use of the timber for mining purposes *was not disputed*, but upon motion of plaintiff, at the conclusion of all the evidence, the court withdrew from the consideration of the jury all evidence in support of the second, that is to say, the mineral defense. The principal reason for the ruling of the court was that Messinger having filed a homestead upon the land, thereby lost the benefit of the Act of June 3rd, 1878, granting the right to cut timber upon mineral land. In addition to this, the court held that some of the timber cut was less than eight inches in diameter, and therefore, as to that, the cutting was in violation of the rule of the Secretary.

The defendant excepted to the order of the court withdrawing from the jury the evidence in support of

the second defense. The jury returned a verdict for the manufactured value of the timber at the time of delivery to the company. Defendant thereupon moved for a judgment notwithstanding the verdict, but the said motion was denied. Thereupon a judgment was entered in favor of plaintiff.

The case was taken to the Court of Appeals, where the judgment was affirmed.

ASSIGNMENT OF ERRORS.

The plaintiff in error relies upon the following errors committed by the Circuit Court of Appeals:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the District of Idaho, Northern Division, for Three Thousand, Three Hundred and Ninety-seven and 02-100 Dollars ($3,397.02), and costs amounting to Two Hundred and One and 87-100 Dollars ($201.87), entered on May 2nd, 1910, in favor of said defendant in error, and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States

Circuit Court aforesaid and in not remanding said cause to said Circuit Court for a new trial.

Fifth. Said Circuit Court of Appeals erred in holding that the said Circuit Court correctly withdrew from the jury all evidence tending to support the defense that the timber in question in the action had been cut by a citizen and *bona fide* resident of the State of Idaho from mineral land not subject to entry under other than the mining laws, said timber being used within the State of Idaho for mining purposes in accordance with the Act of June 3rd, 1878, and the rules of the Secretary of the Interior.

Sixth. Said Circuit Court of Appeals erred in depriving the plaintiff in error of the benefit of the defense prescribed by Section 8 of the Act of Congress of June 3rd, 1891, relating to defense in suits for the cutting of timber upon public lands.

ARGUMENT.

I.

Does a Citizen Authorized to Cut Timber Upon Mineral Land of the United States by the Act of June 3rd, 1878, for the Use in Mining Purposes, Lose His

Right so to do by Filing a Homestead Upon the Land?

The Act of June 3rd, 1878, provides:

"That all citizens of the United States and other persons *bona fide* residents of the States of Colorado or Nevada or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be and are hereby authorized and permitted to fell and remove for building, agricultural, *mining* or other domestic purposes, any timber or other trees growing or being on the public lands, *said lands being mineral*, and not subject to entry under existing laws of the United States except for mineral entry, in either of said states, territories, or districts, of which such citizens or persons may be at the time *bona fide* residents," etc. The evidence in this case showed:

(1) That the timber was cut by Messinger, a native born *citizen* of the United States, and a *bona fide resident* of Idaho.

(2) That the timber was cut from *mineral land* belonging to the United States, and within the State of Idaho.

(3) That the land was not subject to entry under

other laws of the United States except for mineral entry.

(4) That the timber was cut and used for *mining purposes* within the State of Idaho.

(5) That Messinger complied with all rules which were applicable.

It will thus be seen that Messinger complied with all the provisions of the Act. The cutting was therefore lawful unless it was made unlawful by the fact that in addition to complying with the Act he filed a homestead right upon the land.

It cannot be disputed that Messinger could have lawfully cut timber for mining purposes upon the very land in question, had he not filed a homestead thereon; and it cannot be denied that after filing a homestead on this land, he could have lawfully cut timber in any quantity from adjoining tracts of United States mineral land. But it was held by the trial court and by the Circuit Court of Appeals that by filing a homestead he lost one of the rights which he would otherwise have had to the land in question, and could thereafter enjoy one less right than he could exercise in adjoining land in which he had no interest. Inasmuch as the statute makes a violation

thereof a misdemeanor, the filing of a homestead would constitute that a misdemeanor which would otherwise be a lawful act.

If a construction of the statute is adopted which would work such peculiar results, authority therefor must be found in the statute itself.

The reason given by the trial court for such a construction of the statute was as follows:

The statute authorized the cutting of timber from "public lands, said lands being mineral." The filing of a homestead by Messinger, before he cut the timber, operated as a withdrawal of the land from the category of "public lands." (P. 15 F. 27.)

The reason assigned by the Circuit Court of Appeals for affirming the judgment was, in effect, that the mining company was estopped from showing that the land was mineral because Messinger had (unknown to the company) filed a homestead upon the land. We will discuss the reasons assigned by the two courts.

(*a*)

What is the meaning of the expression "public lands, said lands being mineral," as used in the statute authorizing the cutting of timber?

It is true that the courts *in interpreting acts granting lands to railroads and states*, have held that the words "public lands of the United States" means land of the United States to which no homestead or other claim has attached.

Bardon vs. Nor. Pac. Ry. Co., 145 U. S., 535;
Newhall vs. Sanger, 92 U. S., 761.

But such grants are so construed in order to preclude the railroad company from ousting a homesteader from land which had been pledged to him by the laws of the United States.

But those cases do not control the question here; for the United States continued to own the land from which Messinger cut the timber notwithstanding the filing of a homestead entry. *It continued to be "public land" as against Messinger.*

In *Shiver vs. U. S.*, 159 U. S., 491, this Court, in considering the right of the Government to protect timber upon a homestead as against the entryman, said:

> "Obviously the question is not whether such lands are so far withdrawn from sale as to be no longer subject to appropriation by any railroad or other person or corporation to which a land grant has been made, but whether they are still so far the

property of the United States that the Government may protect itself against an unlawful use of them. * * * (After discussing the railroad grant cases, the court said:) While these cases indicate that lands once appropriated to a certain purpose thereby cease to be available for another purpose, there is nothing in them to show that the United States loses its title to such lands by the first appropriation or that they cease to be the property of the Government. Upon the contrary, it was said by this court as early as 1839 in Wilcox vs. Jackson, 13 Peters, 498, 516, that 'with the exception of a few cases nothing but the patent passes a perfect and consummate title.' So in Frisbie vs. Whitney, 76 U. S., 9 Wallace, 187, 193, 'There is nothing in the essential nature of these acts (entering upon lands for the purpose of pre-emption) to confer a vested right or indeed any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right. A mere entry upon lands with continued occupancy and improvement thereof gives no vested interest in it. It may, however, give under our national land system a privilege of pre-emption, but this is only a privilege conferred upon the settler to purchase land in preference to others. *His settlement protects him from intrusion or purchase by others, but confers no right against the Government.*' It was held that it was within the power of Congress to withdraw land which had been pre-empted from entry or sold, though this might defeat the imperfect right of the settler. * * * The right which is given to a

person or corporation, by a reservation of public lands in his favor, is intended to protect him against the action of third parties, as to whom his right to the same may be absolute. But as to the Government, his right is only conditional and inchoate. * * * From this resume of the Homestead Act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until patent is issued; second, that such property is subject to devestiture upon proof of the continued residence of the settler upon the land for five years; *third, that meantime such settler has the right to treat the land as his own so far and so far only, as is necessary to carry out the purposes of the Act.*"

In the case at bar Messinger never could have secured title to the land under the homestead law, because the land was mineral.

Deffenback vs. Hawk, 115 U. S., 392.

Messinger's right was, at most, one to the possession pending his residence. He might exclude any other person, unless the latter made a proper showing that the land was, in fact, mineral, and that Messinger had no lawful right to file or maintain a homestead right upon the land. As between the Government and Messinger, the land was still "public land." Such was the effect of the decision in the Shiver case, *supra*.

In *United States vs. Blendaur*, 128 Fed., 910 (C. C. A. 9th), the court said, in speaking of the expression "public lands":

> "The contention of appellee that they were not 'public lands' because these words indicated only such lands belonging to the United States as are subject to sale or other disposal under general laws (citing Wilcox vs. Jackson, Newhall vs. Sanger, Bardon vs. Railway Company, etc.) cannot be sustained. The words 'public lands' are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results."

In *United States vs. Bisel*, 19 Pac., 251, the Supreme Court of Montana construed the Act of Congress preventing the enclosure of any "public lands," in a case where school lands had been fenced. It was insisted in that case that the land being school land, was no part of the public lands within the meaning of the statute. After discussing the case of *Newhall vs. Sanger*, 92 U. S., 761, 763, and other cases, the court said:

> "We have examined all these cases carefully and do not think they control the case before us. They arose between individuals who claimed rights

under certain reservations as against grants more or less general in which such reservations are not excepted. We must inquire what Congress meant by the use of the words 'public lands' in the statute under consideration. * * * And while Sections 16 and 36 were reserved for the purpose of aiding the development of the public school system in the coming state of Montana, and, so far as their sale for the purpose of settlement was concerned, were segregated from the public domain,—still the title to them and the dominion and control over them remain in the Government of the United States; the agents of the public school system have no control over them. * * * Still such lands must be held to be public lands within the meaning of this act. * * * There is no statutory definition of the words 'public lands' and the meaning of them must vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use."

See also:

Peterson vs. Baker, 81 Pac., 681 (Wash.).

United States vs. Elliott, 41 Pac., 720 (Utah)

This court, in a recent case, decided June 10, 1912, held that lands in the Delaware Indian Reservation, which had been assigned in severalty, were nevertheless "public lands," as used in a railroad grant, the court saying:

> "But it is said that the right of way section was inapplicable, because it was confined to 'public lands,' a term used to designate such lands as are subject to sale or other disposal under the general laws. No doubt such is the ordinary meaning, but it sometimes is used in a larger sense. We think that is the case here."

Kindred vs. Union Pacific Co.

The case of *U. S. vs. Saucier*, 28 Pac., 791, is directly in point. A person who had cut timber, in that case, from land belonging to the United States, was permitted to show that the land was public mineral land, notwithstanding the fact that the land had been filed on as agricultural land.

It will thus be seen that the expression "public lands" does not always mean lands to which no claim has attached, but on the contrary the expression when used alone may be the equivalent of "lands of the United States."

To give the statute here involved any other construction would lead to absurd results in this case, for notwithstanding the fact that Messinger could have cut timber upon this land if he had not filed a homestead thereon, he would be precluded under the construction contended for from cutting timber after he should have

filed a homestead. Under such a construction he would be permitted to cut timber upon adjoining mineral lands to which he had no title whatever, but would be prohibited from cutting timber upon mineral lands to which he had an inchoate right.

Congress evidently intended to authorize the cutting of timber upon any mineral land belonging to the United States for use in mining within the neighborhood. The timber cut by Messinger was used within the neighborhood for mining purposes and was cut from mineral lands. The United States is not, therefore, in a position to object that the timber was not used for the purposes intended, and would, therefore, not be in a position to complain. For the same reason, a third person would not be in a position to complain and Messinger certainly was not injured because he exercised the right to cut the timber and reaped the benefit of its sale.

As further evidence of the purpose of Congress to waive all claim to timber cut upon public lands of every character, where the timber was used for mining purposes, we refer to the Act of March 3rd, 1891 (26 Statutes, 1093), wherein Congress provided "In the States of Colorado, Montana, Idaho, etc. * * * in *any* criminal prosecution or civil action by the United

States for trespass on such public timber lands or to recover timber or lumber cut thereon, *it shall be a defense* if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such state or territory by a resident thereof, for agricultural, *mining*, manufacturing or domestic purposes under rules and regulations," etc.

This statute has been construed as extending the right to cut timber to non-mineral lands, but there can be no doubt that it also applies to mineral lands to the extent that it waives any claim for timber cut under the circumstances described. It is not to be presumed that Congress after having granted a right to cut timber upon certain conditions intended to quibble about words in order to punish civilly or criminally those who had complied with the conditions imposed by the Government. The statute last referred to says that it shall be a defense in *any* suit or proceeding, whether civil or criminal, if the defendant shall show certain facts.

> *Northern Pacific R. Co. vs. Lewis*, 162 U. S., 366, 378.

We respectfully submit that the language of the Act properly construed would preclude the Government from recovering in this action if defendant's defense under

the Act of June 3rd, 1878, had been received and considered by the court and jury.

(*b*)

Would the construction contended for defeat the purpose of Congress and prevent others than the homestead claimant from exercising their right to cut timber?

In denying defendant the benefit of the defense that the timber was used for mining purposes and cut from mineral lands, the trial judge suggested as one reason for his ruling that to hold otherwise would defeat the purpose of Congress; that Congress evidently intended that all persons in the locality where timber was found who should need timber for mining or domestic purposes should have an equal right to cut said timber from mineral lands, and if a person were permitted to file a homestead thereon he could thereby prevent his neighbors from enjoying the same privilege that he enjoyed.

Is this a sound reason for giving a construction to the statute which would otherwise be absurd? We think not. In the first place if a homestead entryman fraudulently filed a homestead upon mineral land, it could be cancelled at the instance of the Government at any moment, and any person interested could secure a can-

cellation upon showing the facts. The homestead claimant could never acquire title under the agricultural laws, because the land was mineral.

In *Manners Construction Co. vs. Reese*, 31 L. D., 408, the Secretary of the Interior, in speaking of a homestead entry, said:

> "The fact that when the alleged mining claim was located the homestead entry of Currence was still of record and uncancelled, did not of itself affect the validity of the location. No vested right to the lands had attached under the entry and until such right should attach the lands belonged to the United States, and if mineral in character are subject to location and purchase under the mining laws."

Another reason why the suggestion of the trial court is not sound is this: If the land were in fact mineral in character as was conclusively shown by the testimony which was offered and finally rejected, Messinger could have made mining locations covering the entire 160 acres, that is to say, he could have made eight separate lode locations in his own name. He could thereby prevent others from entering upon the land and cutting the timber even more effectually than by filing a homestead. He could have cut and used all the timber upon his own claims to the exclusion of any one else.

Again, supposing the land had been non-mineral. People in the neighborhood are granted by the Act of 1891 the right to cut timber from such lands. But a person who had not exhausted his homestead right might prevent others from securing the benefit of the timber by exercising his right upon it.

It did not appear in the present case that Messinger actually excluded anyone from the land who desired to cut timber. If any person had entered thereon for the purpose of cutting timber, would not the courts have protected him in so doing, provided he should show that the land contained valuable mineral veins and that Messinger could not therefore lawfully acquire title under the homestead law, and that his entry was a mere fiction? We think the objection of the court was fanciful rather than real. The timber in question was sold locally for use in mining and was so used. It was cut by a citizen of the United States from mineral land, as the statute directed, and reached the consumer whom Congress intended should have the benefit of the timber. It is well settled that a miner may buy timber cut from mineral land and acquire a good title. He need not cut it himself.

(*c*)

Is the plaintiff in error who purchased the timber

and paid Messinger for it estopped from claiming that the land was mineral land?

The Court of Appeals in affirming the judgment used the following language:

> "The case shows that the land upon which the timber was cut stood upon the books of the Land Department of the Government as public land open to homestead entry, and as such was entered by Messinger, who went into its possession and claimed the right to cut the timber in question to enable him to cultivate the land and to make other uses of it under and in pursuance of the beneficent provisions of the homestead law. One of the requirements of the oath he was compelled to take in making his entry was the declaration of his intention to occupy the land as a homestead and cultivate the same While thus availing himself of the bounty of the Government and occupying that relating to it, he could not legally commit any act upon it or in respect to the land in contravention of the provisions of the law under which he held its possession, and neither he, nor any one claiming under him, can justify his illegal act by saying that although he could not cut the Government's timber and sell it for mining purposes under the provisions of the law under which he was permitted to go into and hold possession of the land, yet, under another law in no way at the time applicable to this particular land, he was permitted to cut timber for min-

ing purposes. We are of the opinion that the court below was clearly right in its ruling respecting the second defense interposed by the defendant."

There are several answers to the argument advanced:

First: The record shows that Messinger at the time of filing upon the land honestly believed that the same was suitable for homestead purposes. There is nothing in the record to show that he knew at that time that the land was mineral land and everything pointed to the fact that he did not know the truth. He had a right to cut the land for the purpose of clearing even for cultivation and could have sold it. Furthermore, to constitute an estoppel the act in question must work an injury to the person claiming the benefit of the estoppel. How was the Government injured? If no homestead had been filed Messinger could have cut the timber because the land was mineral land. The Government took no action whatever upon the application other than to allow it to be filed. It did not enter into an investigation to determine the character of the land or part with any title. The land so far as the Government was concerned still belonged to the United States. No determination of the question could be had until final entry unless some proceeding was filed.

Barden v. N. P. R. R. Co., 154 U. S., 313.

Messinger could not acquire title to the land under the homestead law because the land contained valuable mineral veins.

Deffenback vs. Hawk, 115 U. S., 392.

Second: Messinger is not a party to this action. The Government chose to bring this suit against the innocent purchaser of the timber from Messinger. Is there any reason for applying the doctrine of estoppel against an innocent purchaser in favor of one who has not been injured, and particularly where the act which is claimed to have worked the estoppel was a representation based on a mistake of fact? The mere statement of the question suggests its own answer.

The case of the *United States vs. Saucier*, 25 Pac., 791, decided by the Supreme Court of New Mexico, involved the following facts:

The United States sued the defendant for timber cut from lands of the United States. Defendant filed two pleas, first, not guilty; and, second, that if any timber was converted by defendant, it was taken from mineral lands; that defendants were *bona fide* residents of the Territory of New Mexico, and that the timber was sold for mining purposes.

The trial court refused to permit the defendants to prove that the lands were mineral lands. In reversing the lower court, the Supreme Court said:

> "The court permitted evidence to go to the jury as to the mineral character of lands outside the entries of Crawford and James, but not of the lands within the entries, holding, as the court is informed that the fact of their being entered at the Land Office as agricultural lands precluded inquiry as to their mineral character. Their entries at the Land Office were *ex parte*, and could not affect the defendants in this case. Whether the lands were mineral in character or not was a material issue, and a question for the jury."

There is no evidence whatever in the record to the effect that the mining company knew that Messinger cut the timber from public land, or from land which he did not own, and there is nothing to show that the plaintiff in error knew that Messinger had filed a homestead upon the land from which the timber was taken. All of the elements of estoppel are lacking as against the mining company.

Even if this were a suit against Messinger, there would be nothing inconsistent in his pleading two different sources of authority for cutting the timber; one, the homestead law which permits the cutting for the

purposes of clearing, which he believed he was complying with; the other, the act of June 3, 1878, which authorizes the cutting of timber upon public land, and its sale for mining purposes. If he was mistaken in his belief that the land was suitable for agricultural purposes and was endeavoring to clear it for that purpose, there is no reason for depriving him of the benefit of the truth that the land was in fact mineral. When his first title to the timber failed, he could rely upon the second. The principle is as old as the hills that a person who claims the same property under two different titles may maintain his two claims in one suit.

Stephens vs. M'Cargo, 9 Wheat., 502.

But the mining company made no misrepresentations. In fact, it had nothing to do with the alleged misrepresentations. In what way was the Government injured? The Government took no action upon Messinger's declaratory statement. He was simply permitted to file it, and the Government received certain fees therefor, which fees, of course, were not refunded. The Government parted with nothing by virtue of allowing the homestead claim to be filed. If Messinger had at the time of offering his preliminary filing made an affidavit that the land was in fact mineral in character,

the Government would not have permitted him to file his declaratory statement; but would have permitted him to enter upon the land to cut timber and sell it for mining purposes, exactly as he did do, after filing his homestead.

The record in this case shows that nearly twenty years before the filing by Messinger of the declaratory statement, at least one mining claim was located upon the land in question (Record p. 12, Folio 21), and the land was known to be mineral in character. That within two or three years after Messinger had filed his declaratory statement and before he had attempted to make final proof, the land was almost entirely covered with mining claims. Well defined mineral veins carrying silver, and copper were opened up on the land covered by the homestead; more than $10,000.00 work had been done in developing these veins. Exhibits were introduced consisting of ores taken from the property, which showed on inspection, copper, iron, and silver. Location notices and photographs were introduced. Experienced mining men testified that the land was mineral land. It was admitted that the land was not valuable for agricultural purposes. Against all of this evidence, the Government had nothing to offer. (Record pp. 12-

14.) This evidence certainly was sufficient to go to the jury.

II.

Was the Rule of the Secretary to the Effect That No Timber Shall Be Cut Less Than Eight Inches in Diameter a Valid Rule?

One ground stated by the trial court for denying the defendant the defense that the timber had been cut from mineral land for mining purposes, was that it appeared that a portion of the timber was less than eight inches in diameter and therefore defendant had not shown compliance with the rules of the Secretary. (Rec. p. 15, Fol. 27.) The Act of June 3rd, 1878, authorized the Secretary to make rules and regulations for the "protection of timber and of the undergrowth growing upon such lands, and for other purposes." Pursuant to the statutes the Secretary has at different times prescribed rules, those in force at the time the timber here involved was cut were promulgated on January 18, 1900, and were ten in number.

The first one enumerated the states to which the act was applicable. The second one prescribed that the lands must be shown to be strictly mineral. The third

prescribes that only citizens and *bona fide* residents of the state in question can cut timber. The fourth defines the use for which the timber should be taken. The fifth prohibits the cutting of timber for sale or traffic. The sixth prevented the transportation of the timber out of the state. The seventh prohibits the use of the timber for smelting purposes. The eighth prohibits the cutting of any timber less than eight inches in diameter. The ninth requires that all of each tree should be utilized, and required that the tops, brush and other refuse should be so disposed of as to prevent forest fires. The tenth prescribes the date when the rules shall take effect.

The first seven rules were not within the power of the Secretary to make according to the decisions of the courts. The Secretary was not authorized to add to or take away from the Act. The first seven rules have been either expressly or indirectly decided to be beyond the power of the Secretary to prescribe.

U. S. vs. Rossi, 133 Fed., 380, C. C. A. 9th;

U. S. vs. Price Trading Co., 109 Fed., 229, C. C. A. 8th;

Morgan vs. U. S., 169 Fed., 242;

U. S. vs. United Verde Copper Co., 196 U. S., 207.

Rule 8 is as follows:

"No growing trees or any kind whatsoever less than eight inches in diameter are permitted to be cut."

We respectfully submit that the foregoing rule is absolutely beyond the power of the Secretary to prescribe.

This court in the case of *U. S. vs. United Verde Copper Co.*, 196 U. S., 207, in discussing the validity of Rule 7, which provided that timber could not be cut for smelting purposes, said:

"If Rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. *If he can define one term, he can another. If he can abridge he can enlarge. Such power is not regulation; it is legislation.* The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is given and it has intrusted to the Secretary the power to regulate the exercise of the license, not to take it away. There is undoubtedly ambiguity in the words expressing that power, but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them or intrust the Secretary of the Interior with the power of legislation."

Keeping in mind that the Secretary has no power by rule to add to or subtract from the law in question, let us see what he has attempted to do.

The Act of June 3, 1878, provides:

> "Residents * * * shall be and are hereby authorized and permitted to fell and remove *any timber or other trees*, growing or being upon public lands, said lands being mineral," etc.

The rule of the Secretary:

> "8. *No* growing *trees* of any kind whatsoever *less than eight inches* in diameter are permitted to be cut."

Congress says "*any* timber or tree" may be cut. The Secretary says that "*no tree less than eight inches in diameter* shall be cut." If a tree less than eight inches through is a tree, the rule was absolutely void.

But even if the rule were valid, the court should not have withdrawn from the jury the defense that the land was mineral in character, because it appeared that all of the stull timber cut was more than eight inches in diameter, and that only a portion of the cord wood was cut from trees less than eight inches. As the stulls were enumerated separately in the complaint, the Government would have no right to recover their value provided they had been lawfully cut, simply because a

portion of other timber for which the Government was seeking to recover the value had been unlawfully cut.

The trial court held that sufficient evidence had been offered by the defendant to show compliance with Rule 9, providing that a person cutting timber must dispose of the tops, brush and other refuse so as to prevent the spread of forest fires. And it therefore will not be necessary for us to discuss this rule to any extent. We merely submit the suggestion that this rule should not in any event be invoked in a suit by the Government against the purchaser of timber because a disposition of the tops and brush could not be made until the timber had been cut and as the title to the timber cut must vest at the time of the cutting, if at all, it could not be divested by any failure of the person cutting the same to comply with the rules subsequently. The failure to comply with this rule might properly be punished as a misdemeanor under the 3rd section of the Act, but it could not affect a recovery in a civil action. It will thus appear that the first nine rules prescribed by the Secretary are without force either in this action or in any other civil action; Rule 10 simply prescribes the date when the first nine rules shall take effect. We have no objection to Rule 10 being allowed to stand as a monu-

ment to the ineffective effort of an executive to perform legislative functions.

CONCLUSION.

To sum up:

1. The Government by the Act of June 3, 1878, intended to authorize the cutting of timber upon its mineral land, and by that Act and the Act of 1891 expressly waived any claim for timber cut from mineral lands for mining purposes.

2. The expression "public lands" as used in those Acts is to be so construed as to carry out the intention of Congress and is not to be so construed as to lead to absurd results. As between the Government and an occupant of land under a homestead entry the land continues to be "public land."

3. The Government having granted the right to cut timber for mining purposes upon mineral lands over which it had the exclusive control, would not be injured by the cutting of timber from such lands for such purposes by one to whom the Government had surrendered a partial control under a homestead claim which could never be honestly perfected.

4. Rule 8 of the Secretary is an attempt to nullify the Act of Congress and is therefore void.

The trial court and the Court of Appeals each erred in depriving the defendant of the benefit of its legal defense, and this court should reverse the cause and either direct the trial court to enter judgment for defendant, or grant a new trial.

Respectfully submitted,

MYRON A. FOLSOM,

Counsel for Plaintiff in Error.

15

Office Supreme Court, U. S.
OCT 10 1913
JAMES H. McKENNEY,
Clerk.

No. 101.

In the Supreme Court of the United States.

October Term, 1913.

THE BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

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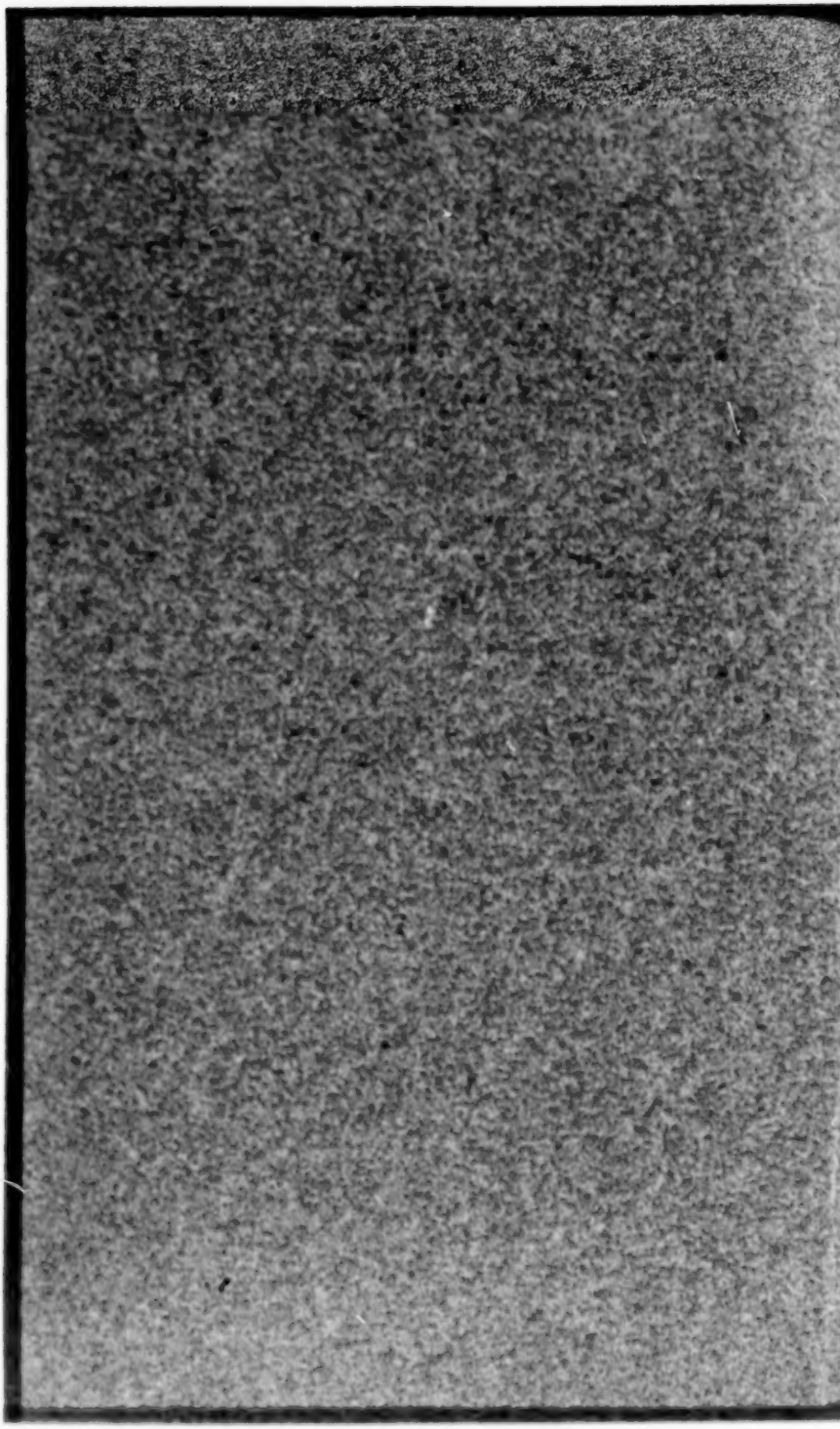

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE BUNKER HILL AND SULLIVAN MINING and Concentrating Company, plaintiff in error,
vs.
THE UNITED STATES.
No. 101.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This is an action by the United States to recover for timber unlawfully taken from described public lands. The lands at the time of the taking were subject to an unperfected homestead entry made by one Messinger. He cut the timber, manufactured it into mining stulls and cordwood, and sold the entire product to the defendant, The Bunker Hill and Sullivan Mining and Concentrating Company, pursuant to a contract (R., 14). Very soon afterwards he relinquished his entry and abandoned his claim. There was no dispute as to the facts of the cutting, manufacture, and sale, nor as to

the values of the cordwood and different sizes of stulls sold; and there was but a slight and negligible difference concerning the quantities. The Government alleged that the land was nonmineral (subject to homestead entry), but that the cutting was wrongful and wilful. The defendant averred that the land was mineral in character, and defended upon two distinct grounds: First, that Messinger, believing the land to be agricultural, cut the timber in good faith for the purpose of clearing the land for cultivation as a homestead; second, that the land being actually mineral, the timber was lawfully taken and sold to the defendant for mining uses, under the act of June 3, 1878 (20 Stat., 88), which is as follows:

> That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of

the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

The regulations of the Secretary of the Interior adopted pursuant to this law and in force when the trespass occurred will be found in volume 29 of the Land Decisions, pages 571–572. Among them is the following:

> 8. No growing trees of any kind whatsoever less than 8 inches in diameter are permitted to be cut.

At the close of the evidence (R. 15) the court, upon the Government's motion, withdrew the "mineral land" defense from consideration by the jury—

> upon the ground that said land having been filed upon as a homestead and under such filing being in the possession and occupation of Messinger, who was claiming the right to occupy the same as a homestead during the time the timber was being cut, the same was not public land, and for the further reason that it appeared from the evidence of both parties without conflict that at least as to the fifteen acres from which all of the timber was cut, both large and small, the rules of the Secretary of the Interior prescribing what timber could be cut from mineral lands had been violated in that timber less than eight inches in diameter had been cut; and that the defendant, as a purchaser from Messinger, had no better right to make such defense than Messinger himself.

The court, however—

> instructed the jury at length with reference to the rights of a homesteader to cut and sell timber from a homestead for the purpose of clearing the same for cultivation, and the measure of damages in the event that the jury should find that the timber had been cut unlawfully, which said detailed instruction advised the jury that a homesteader had the right to cut and remove the timber and do with it what he pleased so fast as was reasonably necessary for the purpose of clearing the land and making it available for agricultural

> purposes, the court emphasizing the obligation of the homesteader while so doing to act in good faith, with due regard for his own needs and the rights of the United States so long as the latter held legal title.

The present record does not set forth the instructions given, and no error is now assigned save such as may be involved in excluding the evidence adduced to sustain the "mineral land" defense and in refusing to apply the other permissive act of March 3, 1891, mentioned below. It must be presumed therefore that in all other respects the instructions as given were accurate and complete. The jury assessed the damages at a sum slightly less than the manufactured value of the total product, as claimed by the Government, and slightly more than the manufactured value as admitted by the defendant (R., 10, 2, 8).

The jury therefore necessarily found as a fact that Messinger was guilty of a wilful abuse of his homestead privileges.

The Court of Appeals affirmed the judgment below for reasons expressed in its opinion (R., 27), as follows:

> The case shows that the land upon which the timber was cut stood upon the books of the Land Department of the Government as public land open to homestead entry and as such was entered by Messinger, who went into its possession and claimed the right to cut the timber in question to enable him to cultivate the land and to make other uses of it under

> and in pursuance of the beneficent provisions of the homestead law. One of the requirements of the oath he was compelled to take in making his entry was the declaration of his intention to occupy the land as a homestead and cultivate the same. While thus availing himself of the bounty of the Government and occupying that relation to it, he could not legally commit any act upon or in respect to the land in contravention of the provisions of the law under which he held its possession, and neither he, nor anyone claiming under him, can justify his illegal act by saying that although he could not cut the Government's timber and sell it for mining purposes under the provisions of the law under which he was permitted to go into and hold possession of the land, yet, under another law in no way at the time applicable to this particular land, persons were permitted to cut timber for mining purposes. We are of the opinion that the court below was clearly right in its ruling respecting the second defense interposed by the defendant.

In defendant's brief (pp. 15, 16) and the assignment of errors some reliance appears to be placed upon another act permitting the cutting of timber, which reads as follows:

> In the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber

> or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, *and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations*, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands. Act of March 3, 1891 (26 Stat., 1093).

The regulations adopted by the Secretary of the Interior under this act, and in force when the cutting took place, are printed in full in 29 L. D., 572–574. Regulation numbered 3 provides:

> Settlers upon public lands and other residents of the States and Territories above named may procure timber free of charge from unoccupied, unreserved, nonmineral public lands within said States and Territories, strictly for their own use for firewood, fencing, building, or other agricultural, mining, manufac-

> turing, or domestic purposes, but not for sale or disposal, nor for use by other persons, nor for export from the State or Territory where procured. The cutting or removal of timber or lumber to an amount exceeding in stumpage value $50 in any one year will not be permitted, except upon application to the Secretary of the Interior, and after the granting of a special permit. Except as above provided, it is not necessary for actual residents to secure permission to take timber from public lands in said States and Territories for the purposes aforesaid. The exercise of such privilege is, however, subject at all times to supervision by the department with a view to such restriction as may be deemed necessary.

The answer (R., 8) alleges that the homesteader, Messinger, in addition to complying with the act of June 3, 1878, *supra*, also "complied in all respects" with this act of March 3, 1891, and "fully complied with all the rules and regulations prescribed by the Secretary of the Interior for the cutting of timber upon public mineral lands in accordance with the acts of Congress." It is quite obvious, however, that this act extends its protection only when the cutting or removal of timber is authorized by the rules and regulations formulated by the Secretary. And as regulation number 3 forbade "the cutting or removal of timber or lumber to an amount exceeding in stumpage value fifty dollars in any one year," unless under a special permit previously granted by the Secretary, it is not perceived that the argument,

or rather the suggestion, based upon this statute, calls for any special reply, since it is not, and could not be, pretended that any special permit was ever applied for or obtained. The assignment of errors filed in the Court of Appeals (R., 18) makes no mention of this statute; neither is it noticed in that court's opinion. Evidently the defendant did not think it worth while to call the statute to that court's attention.

When the case was presented to the Court of Appeals, complaint was made of an instruction in which the trial court remarked to the jury (R., 15):

> Now, cultivation, of course, may involve different conditions, different circumstances. Sometimes it might mean the planting of an orchard, sometimes the growing of alfalfa, sometimes the growing of wheat or oats, and sometimes the production of grass. I do not say to you that the production of grass is not a legitimate purpose, but where a homesteader clears a large amount of land, much larger than is necessary for plowing, and claims that he is doing that for the purpose of pasture merely, you should scrutinize what he says in that respect, and what he has done in that respect, carefully, for the purpose of seeing whether or not he is really acting in good faith, for, as you must see, it would be easy to resort to that method as a mere pretext or cover for fraud.

Upon the present review, however, defendant has abandoned its attack upon this instruction, doubtless because the instruction is so manifestly correct, par-

ticularly so under the circumstances revealed in this case.

The defendant's case (as we view it) now rests entirely upon the act of 1878, *supra*. It assumes, first, that the land cut upon was sufficiently proved to be "mineral" within the meaning of that act; second, that it was "public land" notwithstanding the existence of the homestead entry, and therefore subject to be cut over like any other mineral land owned by the Government; third, that Messinger, notwithstanding his homestead entry, the representations which he made to secure it, and his peculiar duties as a homesteader, was no less entitled to strip the land of timber, under the act of 1878, than any other person would have been; fourth, that the regulation of the Secretary of the Interior, limiting the cutting of live timber to trees 8 inches or more in diameter, is void; and lastly, that the defendant being a "*bona fide* purchaser" is exempt from any estoppel which would properly be adjudged against its vendor, even though he was found guilty of a willful trespass.

Our argument, in condensed statement, is as follows:

I. Tested by the homestead laws, the entryman's acts were those of a willful trespasser; he acquired no title to the timber cut, or to the timber products manufactured therefrom; as against him the United States was entitled to recover those products *in specie*, or to recover their value in damages.

II. The "mineral-land" statute was inapplicable (1) because the lands were not "mineral;" (2)

because they were not "public lands" when the cutting was done; (3) because the regulations were not complied with; and (4) because the entryman was estopped from claiming under that statute.

III. The defendant, whether a purchaser in good faith or not, acquired no title in the property purchased, because its vendor had no title to convey. Consequently it also was liable to surrender the property *in specie* or pay its value to the United States.

1.

Liability of the entryman as tested by the homestead laws.

1. *The cutting was a wilful trespass.*

The broad general rule is against the right to cut timber from lands of the United States. The act has long been punishable as a criminal offense (R. S., sec. 2461; Penal Code, sec. 49). In the absence of legislation expressly or by implication conferring the right, timber cutting is presumed to be unlawful; and one who claims an exception in his favor must bring himself—by clear proof—within the conditions of the authority upon which he specifically relies.

United States v. *Cook* (19 Wall., 591, 594).

Northern Pacific v. *Lewis* (162 U. S., 366, 376).

Stone v. *United States* (167 U. S., 178, 192).

Shiver v. *United States* (159 U. S., 491).

The extent to which a homesteader may lawfully fell and dispose of timber growing upon his claim is a subject which has received the consideration of this court in a number of cases and of the lower Federal courts in many more. In the *Shiver case, supra*, this court said (p. 497):

> From this résumé of the homestead act it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; second, that such property is subject to divestiture, upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation, and to that extent the act limits and modifies the act of 1831, now embraced in Rev. Stat. sec. 2461. It is equally clear that he is bound to act in good faith to the Government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it.

And in the *Stone case, supra*, this court approved as "a clear and satisfactory statement of the law" the charge of the trial court, which is set out in the report and from which we quote the following (p. 193):

> A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off forty acres, it should be in pursuance to a definite plan that the plough shall follow the axe, and that the entire forty acres shall be put to use for the purpose of cultivation or in such manner as a farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a timbered claim, a claim covered by timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith. But a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go and cut that timber by reason of his having filed in the land office a declaration of his intention to take the land under the preemption law than if he goes and cuts it without filing any declaration. Unless the declaration is an honest declaration and is supported by compliance with the requirements of the law, by making a home upon the land, actually living upon it, and actually proceeding in the regular way by

> regular process of improving the land, and putting it in cultivation, and until he has perfected his right by full compliance with the law, he has no right to cut down and sell the timber on other portions of the land which he is not intending to immediately put into cultivation.

In the present case the testimony clearly shows, and the verdict of the jury conclusively establishes, that the entryman was guilty of a willful, inexcusable abuse of his homestead privilege. The Government alleged that the trees were taken wrongfully and willfully, and sued for the value of the manufactured products as it was when they left the hands of the trespasser and passed into the possession of the defendant. The defendant averred that the taking was innocent—done in good faith in the process of clearing the land as a homestead; and set up the ~~statutory~~ stumpage value—the value that should be assessed in case Messinger were found to be an innocent trespasser. The Government introduced evidence described in the bill of exceptions as "tending to support each and every allegation of its complaint." (R., 11.) What that evidence was does not otherwise appear. The defendant called the entryman, who testified that he entered the land as a homestead and went upon it "for the purpose of making it his home;" "that his purpose in filing a homestead upon said land was to make it a home and to clear the land for cultivation and a home," and that while the land was "mountainous and sterile and unfit for cultivation," he "thought about forty or fifty acres could be

plowed," and that "most of the balance could be used for pasture, but some of it was pretty steep for that purpose"—that "some grass grows upon it." This witness admitted the cutting; but the court upon reading his testimony (R., 12) will observe that he nowhere says that the cutting, in whole or in part, was necessary to fit the land cut over for cultivation or pasturage, or even had that tendency, or that he believed it would have that tendency, or that he did the cutting for the purpose of producing that result.

There are features of Messinger's testimony in addition to this omission which, aside from the presumed sufficiency of the Government's proof, might well be regarded as casting doubt not merely upon the good faith of the cutting but even upon the good faith of the entry itself. He conceded that the land was worthless for cultivation and without any water supply even for domestic uses; he admitted that "in cutting cordwood" he cut fifteen acres clear of all timber, large and small, and that "upon the balance he cut only that which was large enough for stulls." He failed to explain either his occasion for desiring the land for a pasture or the reason why he did not discover its worthlessness for cultivation until after the cutting was done. There was no evidence that he had any immediate need for pasture, nor was there any evidence as to how or for what purpose, or for whose stock, any pasture was to be used (R., 14). Then, also, he "left the tops and brush where they fell." And the Government

proved, in rebuttal, that, before he moved his family upon the land, he made the contract to sell the timber to the defendant (R., 14). *Anderson* v. *United States* (C. C. A., Ninth Circuit) (152 Fed., 87).

It must be assumed that, in charging the jury, the trial court defined correctly the limits within which a homesteader may lawfully cut timber, the tests of wilful and innocent trespass, and the measures of damages applicable thereto.

The verdict of the jury (R., 16) was assessed upon the basis of willful trespass, being slightly less than the manufactured value of the timber as alleged in the complaint (R., 2), slightly more than that value as conceded in the answer (R., 6-8), and quite out of proportion to the stumpage value of the timber as alleged (R., 7) and proved (R., 14).

Therefore, Messinger, in cutting the timber was guilty of a willful trespass. The verdict of the jury establishes this fact; and, furthermore (if this be material), the evidence could be viewed in no other way; for in his testimony, which affords the only reply to the Government's evidence on this subject, nothing was said which tends to show that the cutting was either calculated or intended to subserve legitimate homestead purposes.

2. *No title passed to the trespasser before or after manufacture—the stulls and cordwood remained "the absolute property of the United States."*

United States v. *Cook* (19 Wall., 591, 593).

Woodenware Co. v. *United States* (106 U. S., 432, 435).

Shiver v. *United States* (159 U. S., 491, 498).

Northern Pacific v. *Lewis* (162 U. S., 366, 374).

Schulenberg v. *Harriman* (21 Wall., 44, 64).

United States v. *Steenerson* (C. C. A., Eighth Circuit) (50 Fed., 504).

Peyton v. *Desmond* (C. C. A., Eighth Circuit) (129 Fed., 1, 6).

Nitz v. *Bolton* (71 Mich., 388).

Hanselman v. *Kegel* (60 Mich., 550).

II.

Inapplicability of the "mineral-land" statute of June 3, 1878.

1. *The lands were not proved to be "mineral lands."*

Under this statute the lands must be "mineral, and not subject to entry under existing laws of the United States except for mineral entry." In the *Plowman case*, 216 U. S., 372, this court recently had occasion to interpret these words, and it held that lands to be included must be shown to be valuable for mineral deposits; that minerals must be shown to be present in sufficient quantity to justify expenditure for their extraction and to add to the richness of the lands; that the lands must be worth more for mining than for agriculture; and that the timber-cutting privilege does not apply to lands merely shown to be near or adjacent to other lands that pass these tests.

Now, whether the defendant produced evidence of the mineral value of the lands here in question sufficient as a matter of law to justify a finding by the jury that they were mineral lands in the sense of

this statute, may seriously be doubted. One witness, Sinclair (R., 12), spoke of mineral discoveries and locations on lands in the vicinity; of the productiveness of the "mining district;" of a mining claim "at one time" located on the lands in question, and of the existence upon them recently of "extensive mining works * * * which must have cost about $10,000." He also said that there were "well-defined veins upon the property carrying silver and copper." Another witness, McKinnon (R., 13) testified that he "had gone upon the premises in controversy and worked on certain mining claims owned by his brother and other individuals * * *; that he had remained there since the year 1907, working continuously," and that about "950 feet of mining work consisting of tunnels and shafts had been run, and they showed well-defined veins of mineral-bearing rock." Five other witnesses (R., 13) spoke of producing mines more or less distant. They said that the land in question contained well-defined veins carrying copper and silver, and that about $10,000 of development work had been done on that land and nearly all of it had been covered by mining locations. The exhibits (R., 14) illustrated this testimony, consisting in part of notices of locations, of which one was made in 1896, and apparently abandoned, and the five others were made in 1906 and 1907, their subsequent history not being given.

According to the bill of exceptions all of these witnesses testified that the land from which the timber

was cut "was mineral land." If we leave out this general statement, it seems quite plain that their testimony did not suffice to establish with the requisite certainty that the tract as a whole was valuable, and known to be valuable, for its minerals rather than for other purposes. In fact, while they spoke of abandoned and existing locations, and of extensive and costly mining works (in one place, presumably), and of veins containing deposits of certain minerals, these witnesses were remarkably cautious on the prime subject of mineral value—they said nothing on that subject at all. Neither did they show what parts, or what proportions, of the tract were mineralized. The testimony, taken with such inferences as may legitimately be drawn from the existing locations and mining operations, may tend to show that some portions of the tracts were chiefly valuable for mineral; but not the tracts as a whole. This would have afforded the jury no means of ascertaining what portion of the timber was taken from the mineral areas and what portion was not. The testimony also failed to show when it was that the mineral values became known. It does not show that they were known when the cutting took place.

The making of a mining location is not in itself evidence of the mineral value of the land located (*Elda M. & M. Co.* 29 L. D., 279, 281; *Magruder* v. *Oregon and California R. Co.* 28 L. D., 174). It is an *ex parte* proceeding—the act of an individual who may or may not be skilled in mining and who may or may not be actuated by good faith. An *abandoned*

location, if it signifies anything, tends to prove that valuable minerals were *not* found. Whether a discovery in one place is evidence of mineral values at another depends upon extrinsic geological facts and inferences therefrom. No inference can be drawn from the discovery alone.

It was incumbent upon the defendant to show by clear proof that the land from which the timber was derived was in fact mineral land; and if part of it was mineral and part was not, to show, by clear proof, the quantity and the value of the timber and timber products derived from the mineralized portion. As this court said in the case of *Northern Pacific* v. *Lewis* (162 U. S.), at page 376:

> The right to cut is exceptional and quite narrow, and for specified purposes only. The broad general rule is against the right. If the plaintiffs had acquired the right by reason of a compliance with the provisions of the statute, the facts should have been shown by them. The presumption in the absence of evidence is that the cutting is illegal. (*United States* v. *Cook*, 19 Wall. 591.)

It is submitted that the general statements of defendant's witnesses that the land was mineral can not be taken as a compliance with this requirement. Properly speaking, they amount to no more than conclusions drawn by the witnesses from the specific matters to which they testified. Such conclusions can not, of course, rise higher than the source from which they were drawn. They are opinions expressed

upon the very matter in issue—ultimate deductions which only the court was competent to make. With the issue as it was, a statement upon the part of a witness that the land was "mineral land" amounted to a conclusion of law, or meant nothing.

But we will assume that the lands cut upon were mineral within the intent of the act of 1878, and will thereupon consider whether the position of the homesteader would be in any degree improved by that assumption.

2. *The lands were not "public lands."*

The trial court appears to have based its ruling largely upon the proposition that during the existence of the homestead entry the lands could not be considered "public lands" in the sense of the act of 1878. We think this was indubitably correct. We agree that the term "public lands" is not to be dubbed with a hard and fast meaning without regard to the connection in which it is used by Congress. Broadly speaking, all property of the United States is public property, and all land which it owns is public land. If we were dealing with a statute whose object was to protect the Government against injury from fraud, spoliation, negligence, or trespass—for instance, a statute forbidding the cutting of timber, or a statute designed generally to prevent the setting out or negligent leaving of dangerous fires—we should concede without hesitation that the application of the term "public lands," used in such a connection, ought not to be allowed to depend upon any question of the status of the lands under the

general land laws, provided the lands involved were lands still owned by the Government. (*Shiver* v. *United States*, 159 U. S., 491.)

On the other hand, it has been ruled repeatedly that the words "public lands," when employed in the land laws, is to be confined in application to those lands which are open to acquisition under the general land laws, and may not be applied to such as have been reserved by the Government or to such as have been subjected to the filings and claims of individuals and are thereby segregated from the public domain.

Hodges v. *Colcord* (193 U. S., 192).

Hastings, &c., R. Co. v. *Whitney* (132 U. S., 357).

Bardon v. *Northern Pacific* (145 U. S., 535, 538).

Whitney v. *Taylor* (158 U.S., 85, 88, et seq.).

James v. *Germania Iron Co.* (C. C. A., 8th Cir.) (107 Fed., 597, 603).

For when Congress makes a grant, or provides general means for the acquisition, of "public lands," it is not to be taken as intending to undo what has already been done, or interfere with rights which have already arisen, under its previous sanction. Therefore the making of a homestead entry removes the land from the category of "public land" in this latter conception of that term. As long as the entry remains intact, the land is to be deemed appropriated by the Government to the use and benefit of the homesteader, subject, of course, to the con-

ditions and restrictions of the homestead law. If for any reason, the homesteader is not entitled to maintain his entry, that is a matter resting entirely between him and the United States, and the law has provided a way, and only one way, for determining the validity of his entry, namely, through the Land Department.

To be sure, there are provisions which allow an outsider to contest the entry, and in some, if not all, cases, to gain a preference right to make entry himself if the contest prove successful. But only one tribunal may entertain or decide the contest, i. e., the Land Department; and not until that tribunal has found the entry invalid and canceled it, or the entryman has relinquished it voluntarily, does the land become again "public land," and subject to be acquired by others under the general laws. We do not understand that these rules are diminished by any exceptions whatever.

Thus, in *United States* v. *Bagnell Timber Company* (C. C. A., 8th Cir.) (178 Fed. 795), it was held that A could not acquire any right or status as a homesteader by settling upon lands which had been filed upon under the homestead law by B, even though B had abandoned the entry; and, consequently, that timber-cutting by A could not be justified as done for homestead purposes, the court saying (p. 799):

> Martin could take no legal steps to acquire this land under the homestead or any other statutes until the entry of Davis was out of the way. There can not be two dispositions cov-

> ering concurrent time by the Government of the same tract of land. While one grant legally or equitably is outstanding, a second grant can not be made.

And in *Hodges* v. *Colcord*, *supra*, it was held by this court that a homestead entry, *prima facie* valid, though made by one in fact disqualified, removed the land temporarily out of the public domain, so that an attempt made before it was canceled to effect a second homestead entry was futile.

In the case of *Peyton* v. *Desmond* (129 Fed., 1), decided by the Circuit Court of Appeals for the Eighth Circuit, Mr. Justice Van Devanter, who delivered the opinion, had occasion to consider most fully the rights and status of a homesteader, particularly his right to recover for timber taken from his homstead by strangers prior to the making of his final homestead entry. We quote the following from page 12 of the report:

> This conditional or inchoate right included an exclusive right to the possession so long as the plaintiff should comply in good faith with the requirements of the law controlling homestead claims, and included a further right to earn and receive the title. This right to the possession and to earn and receive the title extended to everything which was part of the land—timber as well as soil. The severance of the timber from the soil was a violation or infraction of the plaintiff's right to the possession, and of his right to earn and receive the title. It was an injury to both. It may

be that the conditional or inchoate right of a homestead claimant is subject to a power in Congress to terminate it in whole or in part—as to the land or only as to the timber—at any time before it is perfected into a vested equitable estate by full compliance with the requirements of the law, but it is not terminable or subject to impairment by third persons. Unquestionably, in the absence of the exercise of such a power by Congress—and its exercise here is not claimed—the plaintiff was entitled, upon perfecting his homestead claim, to receive a conveyance of the land in the condition in which it was when his claim was initiated.

* * * The terms of the statute are such that the presence of valuable timber on public land does not exclude it from homestead settlement or entry. It is therefore probable and reasonable that the plaintiff, in selecting this tract from among others, was influenced by the value given to it by its timber. It was the intention of the Government, by the homestead law, and was the intention of the plaintiff, in accepting the provisions of that law, that, upon his compliance with its requirements, he should be entitled to the land, with whatever advantages were incident to its natural condition and character, whether due to the fertility of its soil, or to its growth of timber. But for the act of the defendants, that intention would have been effectuated, and the timber would have passed to the plaintiff by the patent, as did the soil from which the timber was severed. It does not comport with the spirit of the homestead law to say

> that, after the initiation and partial perfection of a homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the Government may convey to him that which is left of the land, and may recover from the wrong doer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant. The law does not contemplate anything so unreasonable. The principles underlying and supporting the doctrine of relation are such that it may be as readily invoked to remedy or correct a loss such as is here disclosed, occurring while the claim was being perfected, as to prevent the loss of the entire right or title through an intervening claim. The plaintiff's title under the patent relates back to a time prior to the severance and conversion of the timber by the defendants, which was after the initiation of his claim, and entitles him to maintain this action.

If the land be, in fact, mineral, the entry is liable to be canceled by the Land Department. But it is not for strangers to determine the question for themselves—or to force the homesteader to foist it upon the courts in an effort to protect his claim against their invasions. The question is not a question for the courts at all, and they have no jurisdiction to decide it.

The defendant argues, in effect, that, by force of the act of June 3, 1878, homesteads are subject to be ranged over and explored for minerals by strangers, and that the timber growing upon any mineral lands that there may be found is subject to be cut down and carried away by them without the consent and against the will of the homestead entryman. A necessary corollary of this doctrine is that the mineral lands would be subject also to be located, entered, and patented under the general mining law without the permission of the homesteader or the prior relinquishment or cancellation of his entry. This is so because when lands are both "public" and "mineral," in other words, when they are lands of the character specified in this act, they necessarily must be subject to exploration and purchase under the general mining law. There can be no sort of question but that the lands which are public and mineral for the one purpose are public and mineral for the other. We hardly need to suggest that it is only the public lands in the more limited sense of the term that are subject to the general mining law. In his work on "Mines," vol. 1, sec. 322, Mr. Lindley says:

> In the preceding chapters of this work it has been demonstrated that only the public mineral lands of the United States may be appropriated under the mining laws. By "public lands" is meant such as are subject to sale or disposal under general laws. Land to which any claims or rights of others have attached does not fall within the designation of "public lands."

See also—

McFadden v. *Mountain View M. & M. Co.* (C. C. A., 9th Cir.) (97 Fed. 670, 680); *Elda Mining and Milling Co.* (29 L. D. 279).

In the case of *Elda Mining and Milling Company* (29 L. D. 279) it was held that a mineral application could not be allowed for land within a prior, subsisting, unperfected homestead entry, even though the mineral discovery and location upon which the application was based were prior in time to the entry of the homestead. The Secretary said (p. 280):

> It is apparent that the mineral entry, to the extent that it conflicts with the existing prior homestead entry of Mrs. Johnson, was erroneously allowed by the local officers. The application for mineral patent should either have been rejected to the extent of such conflict, or notice should have been given to the homestead entrywoman for the purpose of affording her an opportunity to be heard. Her entry, existing of record at the date of the application for mineral patent, was notice to the world of a prior record appropriation and segregation of the land in controversy, and no further entry thereof could be lawfully allowed while her entry still existed of record.
>
> Even if it be true, as now alleged, that the conflicting mining claim was located prior to the homestead entry, it is nevertheless equally true that the homestead entry was regularly allowed, in the absence of any claim of record in the local office at the time, as to any portion of the tract so entered. With the application

to make homestead entry was filed the usual nonmineral affidavit, declaring that the land contained no mineral, and that no portion thereof was claimed for mining purposes, thus establishing *prima facie* the nonmineral character of the land covered by the homestead entry.

* * * * *

It is manifest from the state of the record that a hearing should be had for the purpose of determining the character of the ground claimed by the mineral applicant in conflict with the prior existing homestead entry of Mrs. Johnson—that is, whether the same is more valuable for agricultural or mineral purposes—and you will accordingly direct that such hearing be had, with notice to all parties.

The burden of proof at such hearing will rest upon the mineral applicant, who is in the position of one contesting a prior entry of record apparently regularly allowed.

The Acting Secretary's opinion in the case of *The Manners Construction Company* v. *Rees* (31 L. D. 408), from which a quotation appears on page 18 of the defendant's brief, would seem to countenance the proposition that a valid location may be made of land within a subsisting homestead entry. If this were true, it would seem necessarily to follow, as stated in the quotation, that the location might lawfully be pursued to final entry and purchase, for, as is well said by Judge Ross in *McFadden* v. *Mountain View M. & M. Co., supra:*

> While it is true that the right to mineral lands is initiated by location, after the proper

> discovery of mineral thereon, and that such claims may be held and worked without purchase, yet the law authorizing their exploration also provides for their location, entry, and purchase. (Rev. St., secs. 2319–2350.) It necessarily follows that any of the lands of the United States that are by its general laws open to exploration for minerals are likewise open to location, entry, and purchase as such, if they be mineral in character, and mineral be discovered therein (p. 680).

But we have not been able to find any authority in support of this proposition in the *Manners Company case*, and an examination of the opinion will show that the language quoted by counsel was entirely uncalled for. The case involved an issue between an applicant under the Timber and Stone law and a protesting claimant of a stone placer claim. The placer was actually located before the timber and stone application was made. The placer claimant and its grantors had actual, continuing possession, had opened up and developed valuable quarries of building stone at much expense, and were actually operating the quarries and marketing the stone derived therefrom.

The department properly held, that by the express provisions of the Timber and Stone Act—

> Lands as to which any *bona fide* adverse claim is asserted under any law of the United States, or upon which there is situated any mining claim, or which contain any mining or other improvements, except for ditch or canal purposes, save such as were made by or belong

to the applicant, are not subject to sale or purchase under the statute.

The land had been filed on as a homestead some seven years before the placer location was made, but the homestead was canceled about one year after the time of location and about three weeks before the timber and stone application was filed. Obviously, under the circumstances, the timber and stone applicant was not entitled to purchase over the head of the placer claimant who had made valuable improvements and remained in possession under a *bona fide* claim.

As we have seen, the land included in a homestead entry is separated from the public domain and set apart for the use of the homesteader. So far as strangers are concerned, his possession is as exclusive and his rights as sacred as they would be if he owned the fee—as long as the homestead entry remains intact. It strikes us that to allow outsiders to enter within the limits of his claim, cut down and carry off timber, dig up the soil in quest of minerals, and erect the structures and carry on the operations subsidiary to these purposes, would not only be inconsistent with the character of his claim but would tend also to encourage violence and give rise to litigation involving questions which the courts would not be competent to decide.

3. *The regulations of the Secretary of the Interior were violated.*

The trespasser admitted "that in cutting cordwood he had cut everything large and small, whether

less than eight inches or larger," and "that upon about fifteen acres of the tract he cut everything both large and small." (R., 13.)

This was a direct violation of regulation numbered 8, which prohibits the cutting of growing trees less than eight inches in diameter.

We submit that it is immaterial that some of the timber cut was of the required magnitude. The trespass was a continuing one, and the trespasser had no idea of complying with this regulation. If we could look upon him as claiming the license of the mineral land act, we should be obliged to say that the license was wilfully exceeded. One thus guilty may not be heard to claim credit for the timber which merely chanced to be of the prescribed diameter. By his own conduct he has put himself outside of the license entirely.

The regulation is not void. It is true that the statute in terms permits the taking of "any timber or other trees," but it also directs or authorizes the Secretary of the Interior to prescribe regulations "for the protection of the timber and of the undergrowth growing upon such lands." It is not at all unreasonable to ascribe this latter provision to an intention upon the part of Congress to save the public forests from waste and obliteration. The beneficiaries are authorized to fell timber "subject to" the regulations. It is against their acts, therefore, and not merely the acts of others, that the regulations are to protect the timber and undergrowth. The fact that the undergrowth is included

shows that Congress must have had in mind the conservation of the forests, as well as the protection of existing trees. It is manifest that the conservation of forests depends more upon wise selection of the timber to be taken than upon regulating merely the manner of taking. To clear off the young trees is a wasteful and profligate use, which often results in the annihilation of the forest itself. As this act does not in terms confine the regulation to the method of taking, it should be construed in the public interest to avoid such injurious results. The invariable rule is to construe such legislation strictly against the beneficiaries and in favor of the public.

Our view finds perfect support in the contemporaneous and continuous construction of the statute by the Land Department.

We need only refer to the earliest of the rules and regulations formulated under this law, namely, those submitted by Commissioner Williamson and approved by Secretary Schurz August 16, 1878, which will be found in Copp's Land Owner, vol. 6, pp. 21 and 22. The following quotations will serve to indicate plainly the view of the statute entertained by the department at that early day, a view which has never been departed from:

> With the view to and the intention of preserving the young timber and undergrowth upon the mineral lands of the United States, and to the end that the mountain sides may not be left denuded and barren of the timber and undergrowth necessary to prevent the pre-

> cipitation of the rainfall and melting snows in floods upon the fertile arable lands in the valleys below, thus destroying the agricultural and pasturage interests of the mineral and mountainous portions of the country, I do hereby make and cause to be promulgated by virtue of the power vested in me by the act entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories (excepting Washington Territory) to fell and remove timber on the public domain for mining and domestic purposes," the following rules and regulations:
>
> * * * * *
>
> 2. It shall be unlawful for any person to cut or remove, or cause to be cut or removed, from any of the mineral lands of the United States any timber or undergrowth of any kind whatsoever less than 8 inches in diameter, and any person so offending shall be liable to be fined, in compliance with the provisions of the third section of said act, in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

4. *The entryman would have been estopped from claiming that the lands were mineral lands.*

The court below was right in deciding that the defendant's vendor was in no position to set up a defense based on the act of 1878, even assuming the lands to be "public lands" within that act. As a homestead entryman, he had filed in the land office his affidavit averring that the lands were nonmineral in character and averring his intention to comply

with the homestead law, and on the faith of this representation and assurance his entry had been allowed, and the lands had been set apart for his peculiar use and benefit by the Government. Thus he had come to occupy toward the Government a position analogous to that of a tenant toward his landlord, and was bound by a fiduciary duty to exhibit the utmost good faith and do nothing inconsistent with the law under which he had gained these special advantages. The defendant's contention seems to be that since this man, as a citizen, was qualified to cut timber from mineral lands, and since (as its counsel assert) these particular lands were subject to be cut over by all other qualified persons nothwithstanding the homestead entry, no harm could come to the Government by permitting him to play the double rôle of homesteader and beneficiary of the mineral-land statute.

If the legality of acts were always to be tested by their immediate relation to dollars and cents, this argument might be sound. The same sort of reasoning would uphold a trustee in the doing of many things to his own advantage, which equity will not permit, not because they work actual damage to his beneficiary, but because they do not suit the general conception of fiduciary devotion which equity regards as necessary to guard the trust relation from possible abuse and to maintain its general effectiveness.

A homestead entryman is obliged to make oath that the land is nonmineral, as a condition to the accept-

ance of his application. (R. S., secs. 2302, 2318; Gen. Circular, July 11, 1899, p. 87; 31 L. D., p. 134; *Leonard* v. *Lennox* C. C. A., 8th Cir., 181 Fed. 760, 767.) It is his duty to exclude any land known to be mineral, and it can be no less his duty to do this in respect of lands discovered to be mineral while the entry is pending than in respect of those which were known to be such before the application was made. If he remain quiescent, notwithstanding his knowledge that lands are embraced which lawfully may not be embraced in his claim, his position is that of one who in spirit and intent, if not in positive act, is guilty of a wilful violation of the law. He should relinquish the interdicted land; maintenance of the entry as it is amounts to a continuing claim of that which he has no right to claim. As long as he continues to occupy this status of homesteader he can not claim rights in the land as mineral land without proclaiming his own fraud and wrong. This he is estopped to do. (*Ingraham* v. *United States*, 155 U. S. 434.) *Nemo allegans suam turpitudinem est audiendus.* The estoppel does not depend, like the ordinary estoppel *in pais*, upon possibility of pecuniary harm or property loss. It rests upon a variety of considerations which may not perhaps be reduced to a precise legal formula, but which are none the less patent on that account.

The Government is always injured when its laws are disobeyed. It is much interested in having the boundaries of the various land laws strictly observed; and to this end it must necessarily rely, to a very large extent, upon the representations and acts of

those persons who seek the benefits which the laws confer. (*Leonard* v. *Lennox*, *supra*, p. 766.) When such a person, by representations of fact, backed by his oath, secures for himself the formal separation upon the records of the Government of a body of the public land as agricultural land set apart for his private acquisition, under a law which forbids the acquisition of mineral land, it would be utterly inconsistent to permit him to set up rights in the same land as mineral land under another law which, in effect, excludes every claim of agricultural land. To permit such a proceeding would be to countenance the joint application of two mutually repugnant laws. It would break down and confuse the barriers of the statutes, extenuating the breach of the one by resort to the other. It would serve to encourage fraudulent misrepresentation and concealment. More specifically, it would enable the homestead entryman to gain a virtual monopoly of the timber on mineral land, which should be open to all, and foster the reprehensible and criminal practice of making "dummy" entries in behalf of extensive timber users.

III.

The defendant acquired no right or title by the attempted purchase from the trespasser.

It is enough here to refer to the authorities cited in support of subdivision 2 of proposition I, *supra*. *Nemo dat quod non habet*. As a guilty trespasser, the vendor acquired no title, either in the trees when

felled, or in the stulls and cordwood when manufactured. Therefore he could pass none by the attempted sale. The question of the defendant's good or bad faith is entirely irrelevant.

> To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the Government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the Government has no adequate defense against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural, and other specified uses has been used to screen the lawless depredator who destroys and sells for profit.
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> *Woodenware Company* v. *United States* (106 U. S. 432, 436).

For the foregoing reasons it is respectfully submitted that the judgment should be affirmed.

ERNEST KNAEBEL,
Assistant Attorney General.

DECEMBER, 1912.

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BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 101. Submitted December 17, 1912.—Decided January 6, 1913.

Until it is finally determined that a homestead entry is void because made on mineral land open to mining location under the act of June 3, 1878, the land is segregated from the public domain and the entryman cannot cut timber thereon in violation of the law applicable to homestead entries.

An entryman claiming rights of a homesteader is estopped from defending against violations of the law on the ground that under another statute the land is not open to homestead entry.

One buying from an entryman lumber cut in violation of law from the homestead does so with notice and is liable for the timber unlawfully removed by the entryman.

178 Fed. Rep. 914, affirmed.

THE facts, which involve the rights of a homesteader to cut timber on the land entered and the effect of the entry as segregating the land from the public domain, are stated in the opinion.

Mr. Myron A. Folsom for plaintiff in error.

Mr. Assistant Attorney General Knaebel for the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

In 1903 Messenger made a homestead entry in the Cœur D'Alene Land District. He claimed to have entered in good faith and testified that he lived on the land with his family for some time. While thus in possession he cut many of the trees into stulls, which with the cordwood he sold to the Bunker Hill Company. In 1905 he abandoned the land and the Government brought suit against the Mining Company and recovered judgment for the value of the timber in its improved state. 178 Fed. Rep. 914.

In this court, plaintiff in error claims that the land not being suited for agricultural purposes, could not be entered as a homestead (Rev. Stat., § 2303), but being mineral land in fact was open to mining location and subject to the provisions of the act of June 3, 1878, 20 Stat. 88, c. 150, which authorizes any citizen to "enter upon public lands, being mineral lands," open to mineral entry in order to cut timber therefrom for mining purposes. It argues that the

homestead entry was void and that any citizen, Messenger included, could treat the land as public and cut the timber for mining purposes. It offered evidence tending to sustain its contention as to the character of the land, and excepts to the court's ruling that Messenger and his vendee were estopped from making such claim.

The statute on which the Mining Company relies, applies only to public lands, while this was no longer public in the full sense, although the title remained in the Government which could have cancelled Messenger's entry on proof that it was valuable for mineral purposes. *Deffeback* v. *Hawke*, 115 U. S. 392. But until some such action by the United States, Messenger's entry segregated the land from the public domain and made it so far private as to withdraw it from the operation of the law permitting other citizens to locate mines or cut timber on public mineral land. *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 537; *Shiver* v. *United States*, 159 U. S. 491, 495. Until his claim was cancelled Messenger was entitled to exclude others from the quarter-section. And as they would have been estopped, as against him, from denying that he was lawfully in possession of it as a homestead, so was he estopped from denying that it was a homestead when sued for cutting timber in violation of the law applicable thereto. He could not claim the rights of a homesteader in land intended for settlement and cultivation (Rev. Stat., § 2290) and at the same time defend under another statute which related to public land valuable for mineral purposes. The Mining Company bought with notice that Messenger was a trespasser, and is liable for the timber unlawfully removed by its vendor.

Affirmed.